83-2168

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NO.

in the Supreme Court of the United States

OCTOBER TERM, 1983

RUEL A. GALBREATH,

Appellant,

vs.

THE SCHOOL BOARD OF BROWARD COUNTY, FLORIDA, THE BROWARD COUNTY CLASSROOM TEACHERS ASSOCIATION, INC., and THE PUBLIC EMPLOYEES RELATIONS COMMISSION,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA.

JURISDICTIONAL STATEMENT

Harold D. Smith
LAW OFFICES
HAROLD D. SMITH, P.A.
P. O. Box 1780
Hollywood, Florida 33022
Telephone: (305) 923-6500
Counsel for Appellant

QUESTIONS PRESENTED

I. IS SECTION 447.401 OF THE FLORIDA STATUTES UNCONSTITUTIONAL ON ITS FACE FOR REMOVING THE DUTY OF FAIR REPRESENTATION FROM LABOR ORGANIZATIONS TO NON-DUES-PAYING MEMBERS OF THE CERTIFIED BARGAINING UNIT WHILE MAINTAINING THE UNION'S EXCLUSIVE RIGHT TO REPRESENT SAID EMPLOYEES.

II. DOES SECTION 447.401 OF THE FLORIDA STATUTES VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE U.S. CONSTITUTION BY DISTINGUISHING BETWEEN CLASSES OF EMPLOYEES (MEMBERS AND NON-MEMBERS) ON A BASIS WHICH IS UNRELATED TO THE MERITS OF AN EMPLOYEE'S GRIEVANCE.

III. WAS APPELLANT GALBREATH (A NON-DUES-PAYING MEMBER OF THE CBU) DENIED DUE-PROCESS AND EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION WHEN THE UNION REFUSED TO REQUEST ARBITRATION TO ALLOW HIM TO PROCEED WITH HIS OWN LEGAL COUNSEL WHERE THE SCHOOL

BOARD ALSO REFUSED TO PERMIT HIM TO GO TO ARBITRATION WITH HIS OWN LEGAL COUNSEL.

IV. CAN THE UNION MEET THE DUE PROCESS REQUIREMENT OF AN UNBIASED ADJUDICATOR WHILE DETERMINING THE MERITS OF APPELLANT GALBREATH'S GRIEVANCE WHERE ITS DUTY OF FAIR REPRESENTATION TO HIM HAS BEEN REMOVED BY SECTION 447.401 OF THE FLORIDA STATUTES.

V. IS REMOVAL OF THE DUTY OF FAIR REPRESENTATION FROM A LABOR ORGANIZATION TO NON-DUES-PAYING MEMBERS OF THE CERTIFIED BARGAINING UNIT IN CONFLICT WITH FEDERAL LABOR LAW AS ESTABLISHED BY UNITED STATES SUPREME COURT DECISIONS.

VI. SHOULD THE UNION HAVE THE BURDEN TO PRODUCE EVIDENCE TO SHOW THAT THE REASON IT FAILED TO REQUEST ARBITRATION WAS BECAUSE THE GRIEVANCE LACKED MERIT BASED UPON A REASONABLE INVESTIGATION AND THAT THE REASON FOR REFUSING TO REQUEST ARBITRATION WAS NOT BECAUSE GALBREATH WAS A NON-DUES-PAYING MEMBER OF THE CERTIFIED BARGAINING UNIT.

VII. SHOULD GALBREATH BE PERMITTED TO TAKE HIS GRIEVANCE TO ARBITRATION WITH HIS OWN LEGAL COUNSEL.

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Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA.

OPINIONS BELOW

The opinion of the Florida Supreme Court is reported at 446 So.2d 1045 (Fla. 1984). (A-1). The opinion of the Court of Appeal is reported at 424 So.2d 837 (Fla. 4th

DCA 1983). (A-16). The summary dismissal by PERC of Galbreath's ULP charges is reported at 7 Fla. Pub. Employees Rep. (Lab.Rel. Press), ¶12,287 (A-33,37) and ¶12,288. The Florida Public Employee Reporter will hereafter be cited as "F.P.E.R.". Cites to the Appendix are by page number.

JURISDICTION

This case arose out of a dispute Galbreath had with his employer, The School Board of Broward County, Florida, regarding overtime pay. At all times material to this appeal, Galbreath was a member of the Certified Bargaining Unit but he was not a dues-paying member of the union. The dispute was processed through the first and second steps of the grievance procedure by Galbreath, with the union sitting in. Access to arbitration, Step III, was controlled exclusively by the union, pursuant to the Collective Bargaining Agreement. The union refused to invoke arbitration at Galbreath's request, even though he advised the union he would provide his own legal counsel. The School Board also refused to permit Galbreath to go to arbitration with his own legal counsel on the basis that the union had not invoked arbitration.

Galbreath filed an unfair labor practice charge against both the school board and the union. The charge alleged the union's refusal to allow Galbreath to go to arbitration with his own legal counsel resulted in denial of due process. Galbreath also alleged the effect of the refusal was to coerce him into joining the union in order to get to arbitration. Galbreath initiated his contitutional attack against Section 447.401 of the Florida Statutes in the ULP charge. He also alleged said statute

was inconsistent with principles of Federal Labor Law. (A-42). Without requiring a hearing or production of any evidence from the school board or union, the Public Employees Relations Commission summarily dismissed Galbreath's ULP charge. *Galbreath v. Broward County Classroom Teachers' Ass'n.*, 7 F.P.E.R. ¶12,288 (1981); *Galbreath v. Broward County School Bd.*, 7 F.P.E.R. ¶12,287 (1981). Galbreath took a timely appeal of PERC'S order to the District Court of Appeal, Fourth District, State of Florida. After briefing, oral argument, and supplemental briefing, the Court of Appeal affirmed PERC'S summary dismissal. *Galbreath v. School Board of Broward County et al.*, 424 So.2d 837 (Fla. Dist. Ct. App. 1983). (A-16). However, the Court certified a question to the Florida Supreme Court for consideration on the basis the question was of great public importance. After briefing and oral argument, the Florida Supreme Court affirmed the Court of Appeal's decision. *Galbreath v. School Board of Broward Co., et al.*, 446 So.2d 1045 (Fla. 1984). (A-1). With reference to Appellant's constitutional attack on F.S. §447.401, the Florida Supreme Court said: "We also find Galbreath's constitutional attack on Section 447.401, Florida Statutes (1979) to be without merit." (A-9). Galbreath appealed to this Court, said decision, which was issued on January 26, 1984, rehearing denied on April 5, 1984. (A-11). The Notice of Appeal to the Supreme Court of the United States was filed in the Supreme Court of the State of Florida on May 4, 1984. (A-13). Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (2).

Decisions sustaining jurisdiction of this Court to review the decision below on direct appeal are: *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979); *Cohen v. California, 403 U.S. 15, 17, 18 (1971)*; *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 61 Footnote 3

(1963); *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921). In *Japan Line, Ltd.* a number of appellant's containers were temporarily present in the County of Los Angeles, and the County levied property taxes on the containers. The California Supreme Court upheld the tax as applied. The United States Supreme Court held:

> This Court has appellate jurisdiction to review a final judgment rendered by the highest court of a State in which a decision could be had "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity." 28 U.S.C. §1257(2). In this case, appellants drew in question the validity of California's ad valorem property tax, contending that the tax, as applied to their containers, was repugnant to the Commerce Clause and various treaties, and the California Supreme Court sustained the validity of the tax. Under these circumstances, this Court's appellate jurisdiction would seem manifest . . . Appellants squarely challenged the constitutionality of the tax statute as applied and the California Supreme Court just as squarely sustained its validity, as applied. We have held consistently that a state statute is sustained within the meaning of §1257(2) when a state court holds it applicable to a particular set of facts as against the contention that such application is invalid on federal grounds . . . Citations omitted.
>
> 441 U.S. at 441

The *Japan Line Ltd.* case is practically "on all fours" with the *Galbreath* case on the jurisdictional issue. Galbreath squarely challenged the constitutionality of F.S. §447.401 on its face and as applied, and the Florida Supreme Court just as squarely sustained its validity. In *Dahnke-Walker Co.*, this Court stated:

> The provisions quoted from the jurisdictional section show that in cases where the validity of a state statute is drawn in question because of alleged repugnance to the Constitution the mode of review depends on the way in which the state court resolves the question. If it be resolved in favor of the validity of the statute the review may be on a writ of error: and if it be resolved against the validity the review can only be on writ of certiorari. The provisions take no account of the particular grounds or reasons on which the decision is put
>
> 257 U.S. at 289

In headnote No. 6 of the Florida Supreme Court decision, the following is stated with reference to the consitutionality of F.S. §447.401:

> Statute which provided that all public employees had right to fair and equitable grievance procedure regardless of membership or non-membership in any organization, but which provided that certified employee organizations would not be required to process grievances for employees who were nonmembers of the organization, was not unconstitutional.
>
> 446 So.2d 1045

Galbreath maintains the record shows he raised federal questions below and the Court ruled on the same. This is clearly a proper case for appeal.

If this Court does not consider an appeal to be the proper mode of review, Galbreath requests that these papers be acted upon as a petition for certiorari pursuant to Title 28, U.S.C., Sec. 2103. The issues presented in this case meet the criteria for this Court to issue a Writ of Certiorari, in that the Florida Supreme Court has decided a question in a way in conflict with applicable decisions of the U.S. Supreme Court. The decision of the Florida Supreme Court directly conflicts with the principles of this Court announced in a line of cases, the most significant being *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944); *Vaca v. Sipes*, 386 U.S. 171 (1967); *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967); and *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). This conflict between the State Court decision and decisions of this Court will be further discussed under the heading "The Federal Questions are Substantial".

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. The First Amendment provides in part: "Congress shall make no law abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

U.S.C.A. Const. Amend. I

II. The Fifth Amendment provides in part that: "No person shall be . . . deprived of life,

liberty, or property, without due process of law . . ."

U.S.C.A. Amend. V

III. The Fourteenth Amendment provides in part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U.S.C.A. Amend. XIV §1

IV. Florida Statute Section 447.307 (3)(b) provides: "When an employee organization is selected by a majority of the employees voting in an election, the commission shall certify the employee organization as the exclusive collective bargaining representative of all employees in the unit."

West's F.S.A. §447.307 (3)(b)

V. Florida Statute, Section 447.401 provides in part: *"Grievance procedures* . . . Each public employer and bargaining agent *shall* negotiate a grievance procedure to be used for the settlement of disputes between employer and employee, or group of employees, involving the interpretation or application of a collective bargaining agreement. Such grievance procedure *shall have as its terminal step a final and binding disposition by an impartial neutral, mutually selected by the parties* . . . All public employees shall have

the right to a fair and equitable grievance procedure, administered without regard to membership or nonmembership in any organization, *except that certified employee organizations shall not be required to process grievances for employees who are not members of the organization . . .*"
(emphasis added Note: Laws 1977, c.77-343 added the exception in the last sentence)

West's F.S.A. §447.401

VI. Article I §6 of The Florida Constitution provides: "The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged. Public employees shall not have the right to strike."

West's F.S.A. Const. Art. I §6

STATEMENT OF THE CASE

For simplicity, the following abbreviations will be used throughout this Jurisdictional Statement.

Appellant
RUEL A. GALBREATH ..... Galbreath

Appellees
THE SCHOOL BOARD OF BROWARD COUNTY, FLORIDA ..... School Board

THE BROWARD COUNTY CLASSROOM TEACHERS ASSOCIATION, INC ..... Union or CTA

THE PUBLIC EMPLOYEES RELATIONS COMMISSION ..... PERC

Unfair Labor Practice ..... ULP

Employee included in the Certified Bargaining Unit who is not a dues-paying-member of the union ... Non-dues-paying member of CBU

I. Parties and Contractural Relationship Galbreath teaches horticulture in the Broward County Public School System. The union, which is an employee-organization under Chapter 447, Florida Statutes, and the Employer School Board are parties to a collective bargaining agreement which is applicable to an exclusive bargaining unit consisting of certain job classifications in the Broward County School System. The teacher position held by Galbreath is included in said unit and thus he is a member of the unit which the union has been given an exclusive statutory right to represent. Even though Galbreath cannot withdraw from the certified bargaining unit, he is not required to become a member or to pay dues to the union in the State of Florida, pursuant to the Right-to-Work Law. West's F.S.A. Const. Art. I §6. At all times material to this case, Galbreath was in the status commonly referred to as a non-dues-paying member of the certified bargaining unit. The Collective Bargaining Agreement between the union and the school board gave the union exclusive control over the final arbitration step in the three-step grievance procedure.

II. Facts. Galbreath filed a grievance regarding overtime pay and requested to use his own legal counsel to represent him. The school board denied his request. Galbreath proceeded without his own legal counsel under protest and his grievance was denied by the school board at Steps I and II. A union representative sat in the first two steps of the grievance procedure. Galbreath asked the union to request arbitration under Step III of the grievance procedure. In a letter dated October 20, 1983, Union Official Paul LaChance advised Galbreath that the CTA had decided not to pursue his case to arbitration, since, in the judgment of the CTA, it lacked merit. The letter went on to state: "In an effort to perserve your rights, we have requested and received an extension of the timeliness to file for arbitration to October 31, 1980. A letter from Mr. Siegle will confirm. I would recommend that you discuss this letter with your attorney to determine if you and he would want to pursue the matter on your own." However, when a demand for arbitration was made upon the school board, it rejected the demand.

Galbreath filed a petition with PERC alleging the union and school board had committed an unfair labor practice and that his right to due process had been violated. He also alleged that F.S. §447.401 was inconsistent with Federal Labor Law. (A-42).

III. Summary Dismissal by PERC. Galbreath never had an evidentiary hearing on the ULP charge. PERC summarily dismissed the charge despite correspondence appended to the charge to show that his principal acknowledged that Galbreath might have been negligent had he not taken the initiative to work overtime to protect school property from damage. (A-51). The union

was never required to submit any evidence to show that it made even a cursory investigation of Galbreath's grievance prior to its decision not to request arbitration.

Although Galbreath was never given a chance for a hearing in the lower tribunals on the issues presented in this statement, the record shows that he raised federal questions at the earliest possible moment. (A-42).

The constitutional issues were not only raised in the initial ULP pleading, they were strenuously argued by Galbreath throughout all appellate levels in the Florida Courts. (A-42-50).

IV. **Decision in the Court of Appeal.** Galbreath has included in the appendix, pertinent excerpts from his briefs and pleadings in the lower courts to show he continued to press his constitutional arguments. The record will show he argued that F.S. §447.401 was unconstitutional on its face and that removal of the duty of fair representation, while maintaining exclusivity, violated the Due Process and Equal Protection Clause of the Fifth and Fourteenth Amendments of the U.S. Constitution. (A-42-50). He also maintained it was inconsistent with Federal Labor Law established by decisions of this Court for the Florida Legislature to remove the duty of fair representation from the union while maintaining exclusivity. Galbreath argued it was a violation of his rights for the school board to prohibit him from going to arbitration with his own legal counsel. It was pointed out that Mr. La Chance's letter specifically suggested that Galbreath determine whether he wanted to pursue the matter on his own. After oral argument the Court of Appeal requested supplemental briefs. After receipt of the briefs the Court issued an opinion

which affirmed PERC'S summary dismissal of the ULP. (A-16). In a motion for rehearing, Galbreath urged the Court to follow the established principle in Florida that public sector employees are entitled to the same rights as private sector employees which includes entitlement to a duty of fair representation for all employees within an exclusive bargaining unit. *City of Tallahassee v. The Public Employees Relations Commission*, 410 So.2d 487 (Fla. 1982). Galbreath argued that F.S. §447.401 is unconstitutional on its face. (A-42-44). The Court of Appeal denied the motion for rehearing without comment.

V. **Decision in the Florida Supreme Court.** In the Florida Supreme Court briefs and oral argument, Galbreath continued to vigorously argue his constitutional claims. (A-44-50). The Court showed substantial concern during oral argument about the union having the final say on the merits of Galbreath's grievance and as to whether he would be allowed access to arbitration. The Court raised questions that showed a concern as to whether a union could meet the requirements of being an impartial decision-maker where a non-dues-paying member of the CBU is involved. This line of inquiry shows the Court was considering the due process and equal protection issues. One of the Justices questioned why the union would want to do anything for a non-dues-paying member. It was pointed out that all Galbreath wanted the union to do was to request arbitration so as not to block him from going to arbitration with his own legal counsel. One of the Justices noted it was not likely to appear on the face of the record when a union refused to represent a non-member due to his non-member status. Despite the intense interest shown during oral argument, the Court, in its opinion, failed

to articulate a reasoned reponse to Galbreath's arguments that F.S. §447.401 was unconstitutional on its face and that Galbreath's constitutional rights to due process and equal protection of the laws under the U.S. Constitution had been violated. The Court also failed to address Galbreath's claim that F.S. §447.401 was inconsistent with Federal Labor Law as established by decisions of this Court and contrary to the Florida Supreme Court's ruling in *The City of Tallahassee* case, supra. The constitutional arguments were dismissed by the Court with the single statement: "We also find Galbreath's constitutional attack on Section 447.401, Florida Statutes (1979), to be without merit." (A-9).

It should be noted the Court specifically endorsed the exclusivity doctrine by adopting *In re: Leon County School Board*, 7 F.P.E.R. ¶12286 (1981). In adopting said case, the Florida Supreme Court endorsed PERC'S conlusion that F.S. §447.401 affords the union the option to determine whether it desires to exercise its right of exclusive representation on behalf of non-members. In a motion for rehearing, Galbreath urged the Court to issue an opinion interpreting F.S. §447.401 in a manner which makes its intent and meaning clear and certain, especially as it relates to Federal Labor Law and rights of due process and equal protection of the law. (A-47-50). It was noted decisions of the U.S. Supreme Court had previously been cited which established that the union in this case could not be an unbiased adjudicator to determine whether Galbreath's case had merit. *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *Gibson v. Berryhill*, 411 U.S. 564 (1973). In *Ward* this Court said: "Petitioner is entitled to a neutral and detached judge in the first instance." 409 U.S. at 61,62. In *Gibson*, this Court said:

> It has also come to be the prevailing view that "[m]ost of the law concerning disqualification because of interest applies with equal force to . . . administrative adjudicators". (citations omitted)
>
> 411 U.S. at 579

In the motion for rehearing, Galbreath suggested the union should have the burden of proof that it made a reasonable investigation of his grievance before refusing to request arbitration. Otherwise, it should be assumed the refusal was based upon non-member status and Galbreath should be permitted to go to arbitration with his own legal counsel *Tenorio v. NLRB*, 680 F.2d 598, 601 (9th Cir. 1982) was cited for the principle that "to comply with its duty, a union must conduct some minimal investigation of grievances brought to its attention."

Galbreath argued that F.S. §447.401, on its face, violates the equal protection clause by distinguishing between classes of employees (members and non-members) on a basis which is unrelated to the merits of an employee's grievance. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). (A-50). The Court issued its order on April 5, 1984, denying Galbreath's motion for rehearing, without comment. (A-11). The appeal to this Court followed. (A-13).

VI. **Order of the United States District Court, Southern District of Florida.** In order for this Court to be completely informed as to how Galbreath has pressed his constitutional claims, it is important to comment on his complaint filed in the Federal District Court and the order thereon. Galbreath alleged that F.S. §447.401,

on its face, violated Federal Labor Law, that established the duty of the fair representation doctrine. He also alleged F.S. §447.401 violated his right to due process and equal protection of the laws provided for in the Fifth and Fourteenth Amendments to the U.S. Constitution and his right of redress of his grievance, guaranteed by the First Amendment to the U.S. Constitution. Galbreath invoked jurisdiction of the Federal District Court, Southern District of Florida, pursuant to 42 U.S.C., Sec. 1983, 1985 and 28 U.S.C. Secs. 1331 and 1343. The Federal Court was requested to take pendant jurisdiction to consider the State claims.

The complaint was filed after PERC issued its summary dismissals. At the same time the complaint was filed in Federal Court, Galbreath filed a Notice of Appeal to the State Court of Appeal on PERC's summary dismissal of the ULP charge. This was necessary in order to protect Galbreath's rights in State Court since Sections 447.504 and 120.68 of the Florida Statutes provide that the exclusive method for review of determinations made by PERC is through appellate review by the appropriate Florida District Court of Appeal. Galbreath moved the Florida Court of Appeal to stay the appellate proceedings pending a ruling in the United States District Court. The motion was denied without comment.

On April 24, 1982, the Federal District Court issued an eight-page order granting Defendants' motions to abstain and dismissing the cause without prejudice. In the abstention order, the Court pointed out that F.S. §447.401 had not been specifically construed or interpreted by Florida Courts in a manner which makes its intent and meaning clear and certain. It should be noted F.S. §447.401 was amended by the Florida Legislature in

1977 to provide that certified employee organizations shall not be required to process grievances for employees who are not members of the organization. Apparently the Federal Judge wanted to give the State Court the first opportunity to reconcile said proviso with the U.S. Constitution and National Labor Policy. The State Court did not comply with the Federal Court's suggestion in that it failed to articulate any rational basis for allowing such a proviso to pass constitutional muster.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

Removal of the duty of fair representation while retaining exclusive right to represent strikes at the very heart of due process and equal protection rights. To the knowledge of counsel for Galbreath, Florida is the only State in the United States that grants exclusive representational rights to a labor organization while at the same time, in another section of the same statute, it removes the duty of fair representation to a certain class of employees covered by the certified bargaining unit. Such a statute is unconstitutional on its face and violates the due process and equal protection clauses of the U.S. Constitution. The statute is also inconsistent with Federal Labor Law and completely contrary to the quid-pro-quo requirement for grant of exclusivity which has been consistently supported in decisions of this Court.

The importance of the questions presented in this appeal are underscored by a recent Law Review article written by Dennis O. Lynch, Associate Dean and Professor of Law at the University of Miami School of Law. Although the article appears in the May-September,

1983 issue of the Law Review, it was not actually published and available for citation until after the Florida Supreme Court issued its decision in the *Galbreath* case. The article focuses on Section 447.401 of the Florida Statutes and the amendment thereto which allows a union to refuse to process a non-member's grievance to arbitration. Lynch, *Incomplete Exclusivity and Fair Representation: Inevitable Tensions in Florida's Public Sector Labor Law.* 37 U.Miami L.Rev.573 (1983).

The author raises a number of due process questions including the question as to whether the grievance procedure is structurally biased where the union negotiates the procedure that a non-member must use but the union has been given statutory authority to refuse to represent the non-member. Lynch P.614-618. With further reference to the issue of due process, the author questions whether the union can be an unbiased adjudicator in making a decision on the merits of grievances of non-dues paying members of the certified bargaining unit. Lynch P.629.

In reviewing the handling of Galbreath's case by PERC and The Florida Courts, Dean Lynch noted PERC did not require the union to provide any justification for its decision that the grievance lacked merit. Lynch P.637. He pointed out the documents submitted to PERC with the ULP charge included a letter from the school principal, acknowledging that Galbreath might have been negligent had he not taken the initiative to work overtime to protect school property from damage. Lynch P.630. (A-51). Dean Lynch also noted the Court of Appeal did not even discuss the fair representation issues raised in the ULP charge against the union, but instead the Court only addressed the issue raised by the charge

against the school board. He stated: "In cases such as *Galbreath*, it often is difficult for the employee to provide additional factual support for an allegation of union bias. The issue is essentially one of motive, and the decision-maker has mixed incentives." Lynch P.632. It was pointed out that the situation of a non-union member in a fair representation case is closer to Title VII cases where the U.S. Supreme Court has shifted the burden of production of evidence to the defendant, once the plaintiff has made a prima facie case of discrimination. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252, 253 (1981)

Galbreath argued below that the burden should be placed upon the union to present evidence that it made at least a cursory investigation of his grievance before making a determination it lacked merit. The summary dismissal prevented Galbreath from utilizing discovery to require production of evidence to show that the real motivation for the union's refusing to request arbitration was his non-member status. Common sense dictates that the union could have no other motive for refusing to simply request arbitration after Galbreath informed the union he would be represented by his own legal counsel. As noted by Dean Lynch, PERC did not require the union to produce any evidence despite the fact the pertinent clause of the contract provided for compensation for any "excess assignment at the employee's hourly rate". He pointed out the issue was one of past practice and contract interpretation in the sense of whether this clause only meant prior authorized assignments or also overtime work growing out of an employee's normal assignment, when the overtime was necessary to protect school property. He said Galbreath claimed (a) that his grievance raised a question of past practice and contract

interpretation, (b) that it was denied as unmeritorious, and (c) that his status as a non-member prompted the denial. Dean Lynch suggested that at this point the burden could have been shifted to the union to produce evidence of a thorough investigation of Galbreath's grievance and of substantive reasons for denying it. Lynch, P.636.

In another Law Review article which focuses upon the constitutional nature of the duty of fair representation. author William C. Bryson stated that *Steele v. Louisville & Nashville R.R.*, held that it would be constitutionally impermissible for Congress to delegate as much power to the unions as it did in the National Labor Relations Act, without granting individual union members a judicially enforceable right to freedom from union discrimination. The author stated:

> . . . at several points in the opinion the Court came very close to holding that the right of the employee to fair representation is a constitutional right, or is at least indistinguishable in its degree of protection from a constitutional right. At the very least, *Steele* seems to place a serious obstacle in the way of congressional or judicial abolition of the duty of fair representation. Although the Court expressly looked to the statute to find the implied duty of fair representation, it would ignore the heavy constitutional overtones of the case to assume that the right can be eliminated from the statute without raising constitutional problems. Bryson P.1091, 1092

The Author quoted from *Steele*, where this Court stated:

> If, as the state court has held, the Act confers this power on the bargaining representative of a craft or class of employees without any commensurate statutory duty toward its members, constitutional questions arise. For the representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an *affirmative constitutional duty* equally to protect those rights . . .
>
> We think that the Railway Labor Act imposes upon the statutory representative of a craft *at least as exacting a duty to protect equally the interests of the members of a craft as the Constitution imposes upon a legislature to give equal protection* to the interests of those for whom it legislates. Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents . . . but it has also imposed on the representative a corresponding duty. (emphasis added).
>
> 323 U.S. at 198, 202.

The author concluded the *Steele* case and its progeny at least teaches that the duty of fair representation protects a particularly important right—one that should not be dismissed easily. Bryson, *A Matter of Wooden Logic: Labor Law, Preemption and Individual Rights*,

51 Tex.L.Rev. 1037 (1973). In *Local Union No. 12, United Rubber, Cork, Linoleum & Plastic Workers of America, AFL-CIO v. NLRB*, 368 F.2d 12, 17, 18 (5th Cir. 1966), the Fifth Circuit also citing *Steele* stated the U.S. Supreme Court has indicated that any statute purporting to bestow upon a union the exclusive right to represent all employees would be unconstitutional if it failed to impose upon the union this reciprocal duty of fair representation. The Fifth Circuit noted that even if the act provides that an individual employee may present his claim directly to the employer, it does not diminish the union's duty of fair representation.

Despite the conclusion that Galbreath's constitutional attack against F.S. §447.401 had no merit, neither the Florida Supreme Court nor the Court of Appeals cited a single case or even discussed how it distinguished this case from the numerous decisions of this Court on the quid-pro-quo principle, that a duty of fair representation is required in exchange for exclusivity. They also failed to discuss how the different treatment of members and non-members could pass constitutional muster in light of the equal protection clause.

Both Courts adopted PERC'S ruling in the *In re Leon County School Board* case, *supra*. The problem with PERC'S position on the exclusivity issue is that PERC holds that a union can waive its right of exclusivity if it elects not to process a non-member's grievance based upon the grievant's non-membership status. PERC did not cite a single authority for this far-reaching conclusion that a union can waive its exclusive representation coverage which is specifically defined by statute.

PERC and the Florida Courts have misapprehended the nature of the duty of fair representation and they erred in holding that a union given a statutory exclusive right to represent, can waive its duty of fair representation to someone included in the certified bargaining unit. Such has never been the status of the law throughout this land and it does not make common sense, given the power of labor unions, that a union should be extended statutory rights of exclusive representation over a group of employees, but then be permitted to choose not to represent certain individuals included in the group. This is precisely the kind of circumstances this Court meant to prevent with its decisions in *Vaca v. Sipes, supra; Steele v. Louisville & Nashville R.R., supra; NLRB v. Allis-Chalmers Mfg Co., supra; Abood v. Detroit Board of Education, supra.*

The duty of fair representation doctrine has evolved from federal law and it stands as a fundamental right under national labor policy. In *Bowen v. United States Postal Service*, ____ U.S. ____, 103 S.Ct.588 (1983) this Court stated that it has ". . . applied an evolving federal common law grounded in national labor policy." In discussing the grievance procedure, this Court said: ". . . the union plays a pivotal role in the process since it assumes the responsiblity of determining whether to press an employee's claims. . . . By seeking and acquiring the exclusive right and power to speak for a group of employees, the union assumes a corresponding duty to discharge that responsibility faithfully—a duty which it owes to the employees whom it represents. . ." In citing *Vaca* this Court noted that when the union has the sole power under the contract to invoke the higher stages of the grievance procedure, the Court faces a

strong countervailing interest; the employee's right to vindicate his claim.

The U.S. Supreme Court in the 1977 Term gave specific support to the concept of exclusive union representation in the public sector. *Abood, supra.* In another law review article *Abood* has been cited for authority that "The Supreme Court has held, that, as in the private sector, unions representing public employees have the right to act as exclusive agents for the members and also have the duty of fair representation." Mack & Singer, *Florida Public Employees: Is The Solution to the Free Rider Problem Worse Than the Problem Itself?* 6 Fla. State L.Rev. 1347, 1359 (1978). This article also focuses on the problems presented by F.S. §447.401. The authors conclude that the United States Supreme Court has given constitutional dimension to the duty of fair representation. The authors also concluded that states which enact right-to-work laws do not have authority to alter the principles of union exclusivity. Consequently, the duty-of-fair-representation doctrine, as enumerated in *Steele, supra*, remains applicable in right-to-work states. Mack & Singer P. 1356. Concerning the constitutionally of F.S. §447.401, the authors had this to say:

> The effect of section 447.401 thus, is to cut off nonunion members from any meaningful access to the grievance procedure. This is a clear violation of the union's constitutional duty of fair representation, for nonunion members are treated unequally even though exclusivity is maintained. While the legislature's intent in enacting the amendment may have been

laudable, it must be struck by the courts because the effect violates individual rights.

It is clear the duty of fair representation is applicable to Florida public employees *Gow v. American Fed'n of State, County and Municipal Emloyees, Local 1363*, 4 F.P.E.R. ¶4168 (1978). It should be noted in the *Gow* case PERC looked to the NLRA and federal case law and concluded: "The privilege of exclusive representation granted by Section 447.307 requires the correlative duty of fair representation of *all unit employees*". (emphasis added). Despite its conclusion in *Gow*, PERC now holds that a union can waive its correlative duty of fair representation to non-dues-paying members of the CBU.

There is no rational basis for the Florida Legislature to extend the union's exclusive right to represent to a class of employees that the union has no corresponding duty to represent. Such a distinction between a member and non-member violates the equal protection clause by distinguishing between classes of employees on a basis which is unrelated to the merits of an employee's grievance. The classification is arbitrary and irrational. *Logan v. Zimmerman Brush Co., supra.* This case is discussed in Dean Lynch's article beginning on Page 614. He compares the classification scheme in *Logan* which was held to violate equal protection, with the classification scheme under F.S. §447.401. He notes that an employee's membership or non-membership in the union has the potential to cause identical claims to be treated very differently in terms of the fairness of the hearing they receive. When this court applies The *Logan* Principles to the case at bar it will be obvious

that F.S. §447.401 is invalid on its face as being repugnant to the equal protection clause.

This Court has held that it has the power to review a contention that a state statute is invalid on its face, as being repugnant to federal law. *Bantam Books, Inc., v. Sullivan, supra.* Galbreath also maintains that the statute, on its face, presents a *prima facie* case of violation of the union's duty of fair representation in that a failure to process the grievances of both union and non-union members, equally, is a breach of duty of fair representation. To the knowledge of the attorney for Galbreath, this is the first case brought before this Court which raises the substantial federal question of whether a state legislature can maintain a union's exclusive right to represent while specifically removing, by statute, the union's duty of fair representation to a certain class of employees within the certified bargaining unit. The question involves fundamental principles of Federal Labor Law, due process and equal protection. Even though the Court of Appeal failed to address the constitutional issues, there was no reason for the Florida Supreme Court not to address the issues raised by Galbreath. It is well settled that once the Florida Supreme Court accepts jurisdiction, it will review the entire record, rather than limit its review to the certified question. *Lawrence v. Florida East Coast R.Co.*, 346 So.2d 1012, 1014 (Fla. 1977). The very nature of the questions raised by the Justices during oral argument shows that the federal issues were considered but the basis for finding F.S. §447.401 constitutional was not articulated in the decision.

Galbreath respectfully maintains that this case presents substantial questions of great public importance

and this Court has jurisdiction of the issues under 28 U.S.C. §1257(2). However, if this Honorable Court is not satisfied that it has jurisdiction on appeal, it is respectfully submitted that this case is nonetheless properly before the Court, since the questions presented herein are of substantial federal import and the papers upon which the appeal is predicated can be considered as a petition for certiorari pursuant to 28 U.S.C. §2103. *Commonwealth of Pennsylvania v. City of Philadelphia*, 353 U.S. 230 (1957).

CONCLUSION

The issues raised by this appeal relate to the heart of the Duty of Fair Representation and Exclusivity Doctrine. In upholding the constitutionality of F.S. §447.401, the Florida Supreme Court ignored prior decisions of this Court which establish National Labor Law Policy. The decision also ignored Galbreath's fundamental rights to due process and equal protection of the laws provided for in the U.S. Constitution. The federal questions presented by this appeal are indeed substantial and we urge this Court to note probable jurisdiction in order that plenary consideration, on the basis of briefs on the merits, and oral argument, may be given to resolve the issues herein. In the event this Court concludes that F.S. §447.401 is invalid on its face and that briefing and oral argument is not necessary to that determination, it is respectfully requested the decision of the Florida Supreme Court be summarily reversed and this case be returned to the State Court with instructions to:

1. Provide Galbreath an evidentiary hearing on his Breach of Duty of Fair Representation Claim against the Union and his Unfair Labor Practice Charge against the School Board.

2. Permit Galbreath to proceed to arbitration with his own legal counsel.

3. Assess statutory attorney's fees and costs in favor of Galbreath.

Respectfully submitted,

LAW OFFICES
HAROLD D. SMITH, P.A.
P.O. Box 1780
Hollywood, Florida 33022
Telephone: 305-923-6500

BY: _____
HAROLD D. SMITH

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on , 1984, pursuant to Supreme Court Rule 33, three copies of the foregoing Jurisdictional Statement were mailed to: JIM SMITH, Attorney General, State of Florida, The Capitol, Tallahassee, Fl. 32301; GORDON DEAN ROGERS, ESQ., Muller, Mintz, Kornreich, Caldwell & Casey, P.A. Attorneys for School Board, One Biscayne Tower, Suite 1800, Two Biscayne Boulevard, Miami, Fl. 33131; MARK F. KELLY, ESQ., Frank & Kelly, P.A., Attorneys for Classroom Teachers Association, 341 Plant Avenue, Tampa, Fl. 33606; and PHILLIP P. QUASCHNICK, ESQ., General Counsel, Public Employees Relations Commission, 2600 Blair Stone Road, Suite 300, Tallahassee, Florida 32301.

HAROLD D. SMITH
Counsel for Appellant

Appendix

Appendix A

Opinion of Florida Supreme Court

Supreme Court of Florida

NO. 63,203

RUEL A. GALBREATH,

Petitioner,

v.

THE SCHOOL BOARD OF BROWARD COUNTY, FLORIDA, et al.,

Respondents.

[January 26, 1984]

McDONALD, J.

This case is before us to review a district court decision, *Galbreath v. School Board of Broward County*, 424 So.2d 837 (Fla. 4th DCA 1982), which certified the following question as being of great public importance:

> Where the certified bargaining agent retains contractual control over the arbitral step of the grievance procedure and it declines to process a grievance to arbitration because it believes the grievance to be without merit, is the public employer still obligated to arbitrate the dispute if the grievant submits it to

> arbitration because the certified bargaining agent has declined to "represent the grievant?

Id. at 838. This Court has jurisdiction under article V, section 3(b)(4) of the Florida Constitution. We answer the certified question in the negative and approve the decision under review.

Ruel Galbreath is a public school teacher in Broward County. His employer, the School Board of Broward County, and the Broward County Classroom Teachers Association are parties to a collective bargaining agreement. This agreement covers all teachers including those who, like Galbreath, are not members of the Classroom Teachers Association. Galbreath filed a grievance under the collective bargaining agreement in an attempt to secure payment for certain overtime work. The Classroom Teachers Association represented Galbreath through the first two steps of the three-step grievance procedure but refused to further process his grievance through the final arbitration step. The Classroom Teachers Association based this decision not on Galbreath's non-union status but rather on the lack of merit in his grievance. The school board then rejected Galbreath's demand for arbitration because the collective bargaining agreement gave control over the arbitration step to the Classroom Teachers Association. Galbreath subsequently brought unfair labor practices charges with the Public Employees Relations Commission against both the school board and the Classroom Teachers Association. The Public Employees Relations Commission summarily dismissed these charges and Galbreath appealed.

The district court affirmed the dismissal, holding that Galbreath could be foreclosed from individual arbitration under section 447.401, Florida Statutes (1979). In affirming, the district court adopted the majority opinion of the Public Employees Relations Commission in *Heath v. School Board of Orange County*, 5 FPER 10074 (1979), and the "Declaratory Statement" portion of *In re Leon County School Board*, 7 FPER 12286 (1981). We agree with the district court and approve the following portions of *In re Leon County School Board*, set out in the appendix of the opinion under review, as dispositive of the issues presented in the certified question.

> A union's right to exclusivity over the administration of a collective bargaining agreement includes not only the right to settle a grievance short of arbitration, but also the right to decline to process a grievance when it believes the grievance lacks merit. In either case, the union is deemed to have *represented* the grievant even though the grievance was not pursued to the final stage of the procedure, binding arbitration. Once the bargaining agent chooses to represent a grievant, regardless of the grievant's union membership status, the manner with which it handles the grievance, including a decision not to process the grievance for lack of merit, is subject to the statutory duty of fair representation. See *Heath v. School Board of Orange County*, 5 FPER ¶10074 (1979); *Gow v. AFSCME*, Local 1316, 4 FPER ¶4168 (1978).

However, unlike other jurisdictions, Florida law permits a certified bargaining agent to refuse to represent a grievant who is not a member of the certified organization. Section 447.401, Florida Statutes (1979), provides, in pertinent part:

> All public employees shall have the right to a fair and equitable grievance procedure, administered without regard to membership or nonmembership in any organization, *except that certified employee organizations shall not be required to process grievances for employees who are not members of the organization.* (Emphasis added)

The Commission has concluded that this provision does not serve as a limitation upon the certified bargaining agent's exclusive right of representation. *Heath v. School Board of Orange County*, 5 FPER ¶10074 at 92. Rather, the proviso simply affords the organization the right to determine whether it desires to exercise its right of exclusive representation on behalf of nonmembers.

When a certified bargaining agent declines to represent a grievant because he or she is not a member of the certified organization, the grievant is entitled to pursue the grievance to arbitration, and the public employer is under a concomitant obligation to process the grievance in accordance with the terms set forth in the agreement. *See generally, Blanchett v. School Board of Leon County*, 378 So.2d 68 (Fla. 1st

DCA 1979); *Manatee County Municipal Employees Local 1584 v. Manatee County School Board*, 6 FPER ¶11188 (1980). Therefore, the grievant's right to a fair and equitable grievance procedure mandated by Section 447.401 is protected by allowing the grievant to either represent himself or to seek outside representation, for the purpose of pursuing the grievance in accordance with the procedures set forth in the collective bargaining agreement.

. . . Our rejection of the proposition that Section 447.301(4) *guarantees* an individual unfettered access to the arbitral process is supported by the substantial weight of authority in other jurisdictions interpreting statutory provisions which are identical in all material respects to Section 447.301(4) in both language and policy. *Heath v. School Board of Orange County*, 5 FPER ¶10074 at 91-93; *Maggs v. PLRB*, 11 PPER. ¶11103 (Pa.Comm.Ct. 1980). . . .[W]e find it patently illogical that the Legislature would have adopted practically verbatim the language of a long standing federal statute but have intended an interpretation which is exactly the opposite of the interpretation given the federal statute as long ago as 1944. As we have previously noted, the policy considerations which underlie the interpretation of the federal statute apply with equal force to the Florida public sector collective bargaining scheme.

It is inconsistent to require, on the one hand, an exclusive bargaining agent to fairly

represent all bargaining unit employees in collective bargaining negotiations and administration of a collective bargaining agreement and, on the other hand, to allow individual employees to advance grievances which may assert an interpretation of that agreement contrary to that of the bargaining agent and possibly the employer. Under such a scheme, the bargaining agent's status as exclusive representative in the determination of wages, hours and terms and conditions of employment is emasculated because the employer would be required to process through arbitration every individual grievance upon request, regardless of merit. Such individual grievance processing is in effect individual negotiations between the employer and the employee regarding the subject matter of the grievance. The Florida courts have long recognized the inherently destructive effect that individual negotiations between employer and employees have upon the right to collectively bargain. *Pasco County School Board v. PERC*, 353 So.2d 108, 4 FPER ¶4033 (Fla. 1st DCA 1977). Such individual negotiations are no less destructive simply because they occur during the grievance process rather than at the negotiating table.

There are also important practical reasons for limiting access to the arbitration machinery of contractual grievance procedures. Unlimited individual access would allow every employee, regardless of motive, to compel arbitration proceedings where the parties who negotiated

the collective bargaining agreement deemed such proceedings unwarranted. The potential for harassment of the union and the employer, to the detriment of all concerned, from disgruntled individuals is very real. *See e.g., Black-Clawson Co., Inc. v. International Association of Machinist, Lodge 355*, 313 F.2d 179, 196 (5th Cir. 1962). Furthermore, one need not be very experienced in labor relations to realize the attractiveness to a rival or a minority union of being able to compete with the incumbent union for [members] by indirectly processing grievances, regardless of merit, through an individual member. *See McGuire Public Employee Collective Bargaining In Florida—Past, Present and Future*, Fla.State L.Rev. 26, 101-02 (1973).

Finally, the policy we have adopted protects the taxpayer from the compulsory but unnecessary expenditures of public funds, a policy consideration not present in the private sector. If individual employees may, at their whim, compel arbitration of all grievances regardless of merit and contrary to the desires of the employer and the bargaining agent, significant public funds will be spent on expensive arbitration proceedings which would otherwise not be expended. The parties to the collective bargaining agreement would therefore have less funds available for truely [sic] meritorious grievances and the employer might be compelled to settle non-meritorious grievances contrary to a reasonable interpretation of the collective bargaining agreement to avoid

expense, thereby establishing an erroneous precedent applicable to subsequent grievances. The interference with the statutory goal of promoting harmonious and cooperative relationships between the government and its employees who have chose to bargain collectively . . . is accurately summarized by the following language from *Vaca v. Sipes*, 386 U.S. at 191-92, 87 S.Ct. at 917-18:

> If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the individual grievant to the vagaries of independent and unsystematic negotiation. Moreover, under such a rule, a significantly greater number of grievances would proceed to arbitration. This would greatly increase the cost of the grievance machinery and could so overburden the arbitration process as to prevent it from functioning successfully.

. . . the Commission's decision in *Heath* does not stand for the proposition that an individual has the unfettered right to advance a grievance through the contractual grievance procedure once the certified bargaining agent has exercised its exclusive right to discontinue processing the grievance based upon its good faith determination that the grievance lacks

> merit. As the above discussion demonstrates, such a conclusion is the antithesis of the concept of exclusiv[it]y embraced by our decision in *Heath.* 5 FPER ¶10074 at 92. Accordingly, where the parties[']collective bargaining agreement reserves to the certified bargaining agent the exclusive right to submit grievances to arbitration, a public employer is not obligated to process an individual's grievance to arbitration if the certified bargaining agent has declined to advance the grievance because of its belief that the grievance lacks merit. Indeed, if the public employer does process such a grievance to arbitration at the individual's request it might well violate Section 447.501(1)(a), (c), Florida Statutes (1979). Such action could constitute circumvention of the bargaining agent and a unilateral alteration of the contractual grievance procedure. *Leon County CTA v. Leon County School Boa[illegible]*, 6 FPER ¶11001 at 4.

424 So.2d at 841-43 (footnotes omitted, emphasis added by fourth district).

We therefore answer the certified question in the negative. We also find Galbreath's constitutional attack on section 447.401, Florida Statutes (1979), to be without merit. Accordingly, we approve the decision under review.

It is so ordered.

ALDERMAN, C.J., BOYD, OVERTON, EHRLICH and SHAW, JJ., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Application for Review of the Decision of the District Court of Appeal – Certified Great Public Importance

Fourth District – Case No. 81-1394

Harold D. Smith, Hollywood, Florida,

for Petitioner

Gordon Dean Rogers of Muller, Mintz, Kornreich, Caldwell, Casey, Crosland & Bramnick, Miami, Florida,

for Respondent, The School Board of Broward County, Florida

Richard H. Frank, Mark F. Kelly and Richard T. Donelan, of Frank & Kelly, Tampa, Florida,

for Respondent, The Broward County Classroom Teachers Association, Inc.

Phillip P. Quaschnick, Deputy Assistant General Counsel, Tallahassee, Florida,

for Respondent, Public Employees Relations Commission

Appendix B

IN THE SUPREME COURT OF FLORIDA
THURSDAY, APRIL 5, 1984

CASE NO. 63,203
District Court of Appeal,
4th District—No. 81-1394

RUEL A. GALBREATH,

Petitioner,

vs.

THE SCHOOL BOARD OF BROWARD COUNTY, FLORIDA, et al.,

Respondents.

The Motion for Rehearing and Reconsideration filed by attorney for petitioner is hereby denied.

The Motion to Strike filed by attorney for respondent, the Broward County Classroom Teachers Association, Inc., is hereby denied.

The Motion for Attorney's Fees filed by attorney for petitioner is hereby denied.

The Motion for Attorneys Fees filed by attorney for respondent, the Broward County Classroom Teachers Association, Inc., is hereby denied.

C

cc: Hon. Clyde L. Heath, Clerk
Harold D. Smith, Esquire
Mark F. Kelly, Esquire
of Frank & Kelly
Philip P. Quaschnick, Esquire
Gordon Dean Rogers, Esquire
of Muller, Mintz, Kornreich,
Caldwell, Casey, Crosland
& Bramnick

A True Copy

TEST

Sid J. White
Clerk Supreme Court

By: Debbie Causseaux
Deputy Clerk

Appendix C

IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. 63,203
4th DCA CASE NO. 81-1394
PERC CASE NO. CA 81-007
CA 81-027

RUEL A. GALBREATH,

Appellant/Petitioner,

vs.

THE SCHOOL BOARD OF BROWARD COUNTY, FLORIDA, THE BROWARD COUNTY CLASSROOM TEACHERS ASSOCIATION, INC., and THE PUBLIC EMPLOYEES RELATIONS COMMISSION,

Appellees/Respondents.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that RUEL A. GALBREATH, the Appellant/Petitioner above named, hereby appeals to the Supreme Court of the United States from the Final Judgment of the Florida Supreme Court, rendered on January 26, 1984, and the Order dated April 5, 1984 denying Petitioner's Motion for Rehearing and Reconsideration and denying Petitioner's Motion for Attorney's Fees.

This Appeal is taken pursuant to 28 U.S.C. §1257(2). 28 U.S.C. §2403(b) may be applicable in this Appeal and a copy of this Notice is served upon the Attorney General of the State of Florida, pursuant to Supreme Court Rule 28.4(c).

LAW OFFICES
HAROLD D. SMITH, P.A.
P.O. BOX 1780
Hollywood, Florida 33022
Telephone: 305-923-6500
Attorney for Appellant/Petitioner

By: _____
HAROLD D. SMITH

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 3, 1984, pursuant to Supreme Court Rule 28, the foregoing Notice of Appeal was served on the following in the manner indicated:

SID J. WHITE, Clerk of the Supreme Court Supreme Court Building, Tallahassee, Fl 32301 by delivering the original to Purolator Courier Service, Fort Lauderdale, Florida, for delivery by Courier Service.

CLYDE L. HEATH, Clerk of the Fourth District Court of Appeal, 1525 Palm Beach Lakes Blvd., P.O. Box A, West Palm Beach, FL 33402, by copy deposited with the U.S. Postal Service for delivery by regular mail.

JIM SMITH, Attorney General, State of Florida, The Capitol, Tallahassee, FL 32301, by copy deposited with the U.S. Postal Service for delivery by regular mail.

Gordon Dean Rogers, Esq.
Muller, Mintz, Kornreich, Cladwell,
& Casey P.A.
Attorneys for School Board
One Biscayne Tower, Suite 1800
Two Biscayne Boulevard
Miami, Fl. 33131, by copy deposited with the U.S. Postal Service for delivery by regular mail.

Mark F. Kelly, Esq.,
Frank & Kelly, P.A.
Attorneys for CTA
341 Plant Avenue
Tampa, Florida 33606, by copy deposited with the U.S. Postal Service for delivery by regular mail.

Phillip P. Quaschnick, Esq.
Deputy Assistant General Counsel
Public Employees Relations Commission
2600 Blair Stone Road, Suite 300
Tallahassee, Florida 32301 by copy deposited with the U.S. Postal Service for delivery by regular mail.

/s/ _____
HAROLD D. SMITH, P.A.

Appendix D

IN THE DISTRICT COURT OF APPEAL
IN THE STATE OF FLORIDA
FOURTH DISTRICT
JULY TERM 1982

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING PETITION
AND, IF FILED, DISPOSED OF.

CASE NO. 81-1394.

RUEL A. GALBREATH,

Appellant,

v.

THE SCHOOL BOARD OF BROWARD COUNTY, FLORIDA, THE BROWARD COUNTY CLASSROOM TEACHERS ASSOCIATION, INC.,

and

THE PUBLIC EMPLOYEES RELATIONS COMMISSION,

Appellees.

Opinion filed November 17, 1982

Appeal from the State of Florida,
Public Employees Relations Commission.

Harold D. Smith, Hollywood, for appellant.

Gordon Dean Rogers of Muller, Mintz, Kornreich, Caldwell & Casey, P.A., Miami, for appellee, School Board of Broward County, Florida.

Richard H. Frank, Mark F. Kelly, and Francis M. Kinsey, Law Offices of Frank & Kelly, P.A., Tampa, for appellee, The Broward County Classroom Teachers Association, Inc.

Phillip P. Quaschnick, Deputy Assistant General Counsel, Tallahassee, for appellee, Public Employees Relations Commission.

BERANEK, J.

Appellant seeks reversal of summary dismissals of his unfair labor practice charges filed against The School Board of Broward County and the Broward County Classroom Teachers Association before the Public Employees Relations Commission. The Commission summarily dismissed appellant's charges. We affirm.

Appellant is a public school teacher in the Broward County school system. He is not a member of the Broward County Classroom Teachers Association, which is an employee organization under Chapter 447, Florida Statutes. The Classroom Teachers Association and the School Board are parties to a collective bargaining agreement governing the teachers of Broward County. Appellant filed a grievance claiming that he had not been properly paid for certain overtime work. The Classroom Teachers Association refused to process appellant's grievance through the arbitration step

provided for in the collective bargaining agreement. The agreement gave the certified bargaining agent control over the final arbitration step in the three step grievance procedure. The Classroom Teachers Association found that appellant's grievance lacked merit and refused to process it through the arbitration stage. The union did not base its refusal on appellant's nonunion status. Appellant was thereby foreclosed from arbitration and filed an unfair labor practice charge with the Public Employees Relations Commission which summarily dismissed the charge. The present appeal results.

Although numerous issues are raised, we conclude that only one presents arguable merit. Appellant contends that he cannot be legally foreclosed from arbitration under Section 447.401, Florida Statutes (1979). This precise question was presented and decided adversely to appellant in *Heath v. School Board of Orange County*, 5 FPER 10074 (1979), and *In Re Leon County School Board*, 7 FPER 12286 (1981). The question, simply put, is whether a union may refuse to process nonunion public employees' grievances through the arbitration stage of the statutorily required grievance procedures prescribed by Section 447.401, Florida Statutes (1979). In the case of *In Re Leon County School Board*, 7 FPER 12286 (1981), the Commission stated the question as follows:

> Where the certified bargaining agent retains contractual control over the arbitral step of the grievance procedure and it declines to process a grievance to arbitration because it believes the grievance to be without merit, is the public employer still obligated to arbitrate the dispute if the grievant submits it to

arbitration because the certified bargaining agent has declined to "represent" the grievant?

The Commission answered this question in the negative in an opinion which is produced verbatim herein.[1]

Substantially the same question was discussed at length in the majority and dissenting opinions filed by the Commission in *Heath v. School Board of Orange County, supra.* The views expressed in the *Heath* majority opinion and in the later "Declaratory Statement" in the *Leon County School Board* case are hereby adopted by this Court in our present affirmance of the summary dismissal of appellant's unfair labor practice charges.

Deeming the above stated question to be of great public importance, we answer it in the negative and certify same to the Supreme Court.

AFFIRMED.

DOWNEY and ANSTEAD, JJ., concur.

1. Leon County School Board
Decision of PERC
In re Petition for Declaratory Statement of the School Board of Leon County.

Case No. DS-81-001, 81D-238
June 26, 1981

Before Powers, Chairman; Parrish and Brooks, Commissioners

DECLARATORY STATEMENT

POWERS, Chairman. On February 5, 1981, the School Board of Leon County filed a petition for declaratory statement[1] pursuant to Section 447.207(7), Florida Statutes (1979), and Florida Administrative Code Rule 38D-22.02. Notice of the petition was published in the Florida Administrative Weekly on March 6, 1981, in compliance with Section 120.565, Florida Statutes (1979).

On March 26, 1981, both the Leon County Classroom Teachers Association, FTP/NEA (LCTA or Association) and the Florida Education Association/United, AFT, AFL-CIO, (FEA) filed memoranda in support of their respective positions.

The School Board requests that the Commission answer the following questions:

> Where the certified bargaining agent retains contractual control over the arbitral step of the grievance procedure and it declines to process a grievance to arbitration because it believes the grievance to be without merit, is the public employer still obligated to arbitrate the disute if the grievant submits it to arbitration because the certified bargaining agent has declined to "represent" the grievant?
>
> Does the answer to the above question depend on whether or not the grievant is a member of the certified bargaining agent? If so, how?

According to the petition, the LCTA is the certified bargaining agent for a unit of instructional employees employed by the School Board of Leon County. The grievance procedures set forth in Article VI of the current collective bargaining agreement between the LCTA and the School Board allows all instructional employees to file a grievance at Step I, but reserves to the LCTA the exclusive authority to advance the grievance to Steps II, and III, the latter step being the arbitration provision.[2]

On September 30, 1980, Freddie O. Hadley, an instructional employee within the certified bargaining unit who is not a member of the LCTA, individually filed a grievance against the School Board asserting that she did not receive a timely payment of her monthly salary as required by the terms of the collective bargaining agreement. After Hadley's supervisor denied the grievance at Step I, the LCTA intervened at Step II of the grievance procedure and submitted her grievance to the Director of Employee Relations, the Superintendent's designee. On November 18, 1980, the Director denied the grievance.

By letter dated December 2, 1980, the LCTA informed Hadley of its decision not to submit her grievance to arbitration. The letter advised the grievant, in pertinent part, that:

> Based on advice from General Counsel, LCTA has decided not to process your grievance to arbitration. In both his opinion and mine, the contract has not been violated as set forth in your grievance.

* * *

> Ms. Hadley, I feel that I must express one final thought in this letter. LCTA is taking exactly the same care with your grievance as we do with the grievances of our members, who pay their dues to provide for *all* teachers (emphasis in original).

On December 12, 1980, Hadley advised the School Board of her intent to individually submit the grievance to arbitration. The grievant thereafter filed a demand for arbitration with the American Arbitration Association.

Resolution of the questions presented requires an examination of the Commission's decisions in *Heath v. School Board of Orange County*, 5 FPER ¶10074 (1979) and *Leon County CTA v. Leon County School Board*, 6 FPER ¶11001 (1979). In *Heath*, the Commission concluded that the Orange County School Board did not unlawfully refuse to process a grievance by failing to arbitrate a grievance brought by an individual employee where the collective bargaining agreement provided that grievances could be submitted to arbitration only by the certified bargaining agent. Similarly, in *Leon County CTA*, the Commission determined that the School Board violated Section 447.501(1)(a), (c) and (f), Florida Statutes (1979), by processing individual employee grievances to arbitration in derogation of the collective bargaining agreement which provided that only the LCTA could submit grievances to arbitration.

The underlying rationale in both cases turned upon the well-established principal of exclusive representation embodied in Section 447.301(3)(b), Florida Statutes (1979), which provides, in pertinent part, that the certified agent shall act as "the exclusive collective bargaining

representative of all employees in the unit." The principle of exclusivity, as the Commission recognized in *Heath*, is essential to the advancement of labor stability:

> The designation of a single representative avoids the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment. It prevents inter-union rivalries from creating dissension within the work force and eliminating the advantages to the employee of collectivization. It also frees the employer from the possibility of facing conflicting demands from different unions, and permits the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations.

5 FPER ¶10074 at 91, *quoting from Abood v. Detroit Board of Education*, 431, U.S. 209 (1977).

The Commission also recognized in *Heath* that the determination of terms and conditions of employment does not end when the parties enter into a collective bargaining agreement. Rather, the interpretation of the agreement through the grievance arbitration procedure may also have a significant impact on the unit employees' terms and conditions of employment. The principle of exclusivity applies not only to the negotiation of a collective bargaining agreement but also the the administration of the agreement through the grievance-arbitration procedure. 5 FPER ¶10074 at 91. Consequently, a certified bargaining agent may negotiate a provision whereby it retains ultimate control over the grievance-arbitration machinery. In reaching

this policy determination in *Heath* we found the rationale enunciated by the United States Supreme Court in *Vaca v. Sipes*, 386 U.S. 171, 191 (1969), particularly compelling:

> In providing for a grievance and arbitration procedure which gives the union discretion to supervise the grievance machinery and to invoke arbitration, the employer and the union contemplate that each will endeavor in good faith to settle grievances short of arbitration. Through this settlement process, frivolous grievances are ended prior to the most costly and time-consuming step in the grievance procedures. Moreover, both sides are assured that similar complaints will be treated consistently, and major problem areas in the interpretation of the collective bargaining contract can be isolated and perhaps resolved. And finally, the settlement process furthers the interest of the union as statutory agent and as coauthor of the bargaining agreement in representing the employees in the enforcement of that agreement.

A union's right to exclusivity over the administration of a collective bargaining agreement includes not only the right to settle a grievance short of arbitration, but also the right to decline to process a grievance when it believes the grievance lacks merit.[3] In either case, the union is deemed to have *represented* the grievant even though the grievance was not pursued to the final stage of the procedure, binding arbitration. Once the bargaining agent chooses to represent a grievant, regardless of the grievant's union membership status,

the manner with which it handles the grievance, including a decision not to process the grievance for lack of merit, is subject to the statutory duty of fair representation. See *Heath v. School Board of Orange County*, 5 FPER ¶10074 (1979); *Gow v. AFSCME*, Local 1316, 4 FPER ¶4168 (1978).

However, unlike other jurisdictions, Florida law permits a certified bargaining agent to refuse to represent a grievant who is not a member of the certified organization. Section 447.401, Florida Statutes (1979), provides, in pertinent part:

> All public employees shall have the right to a fair and equitable grievance procedure, administered without regard to membership or nonmembership in any organization, *except that certified employee organizations shall not be required to process grievances for employees who are not members of the organization.* (Emphasis added)

The Commission has concluded that this provision does not serve as a limitation upon the certified bargaining agent's exclusive right of representation. *Heath v. School Board of Orange County*, 5 FPER ¶10074 at 92. Rather, the proviso simply affords the organization the right to determine whether it desires to exercise its right of exclusive representation on behalf of non-members.

When a certified bargaining agent declines to represent a grievant because he or she is not a member of the certified organization, the grievant is entitled to pursue the grievance to arbitration, and the public employer is under a concomitant obligation to process

the grievance in accordance with the terms set forth in the agreement. *See generally, Blanchett v. School Board of Leon County*, 378 So.2d 68 (Fla. 1st DCA 1979); *Manatee County Municipal Employees Local 1584 v. Manatee County School Board*, 6 FPER ¶11188 (1980). Therefore, the grievant's right to a fair and equitable grievance procedure mandated by Section 447.401 is protected by allowing the grievant to either represent himself or to seek outside representation, for the purpose of pursuing the grievance in accordance with the procedures set forth in the collective bargaining agreement.

FEA's argument on this point is based upon an interpretation of Section 447.301(4), Florida Statutes (1979), which we expressly rejected in *Heath*. Our rejection of the proposition that Section 447.301(4) *guarantees* an individual unfettered access to the arbitral process is supported by the substantial weight of authority in other jurisdictions interpreting statutory provisions which are identical in all material respects to Section 447.301(4) in both language and policy. *Heath v. School Board of Orange County*, 5 FPER ¶10074 at 91-93; *Maggs v. PLRB*, 11 PPER ¶11103 (Pa. Comm. Ct. 1980). We therefore decline the FEA's implicit invitation to recede from our previous interpretation of Section 447.301(4) because we find it patently illogical that the Legislature would have adopted practically verbatim the language of a long standing federal statute but have intended an interpretation which is exactly the opposite of the interpretation given the federal statute as long ago as 1944.[4] As we have previously noted, the policy considerations which underlie the interpretation of the federal statute apply with equal force to the Florida public sector collective bargaining scheme.

It is inconsistent to require, on the one hand, an exclusive bargaining agent to fairly represent all bargaining unit employees in collective bargaining negotiations and administration of a collective bargaining agreement and, on the other hand, to allow individual employees to advance grievances which may assert an interpretation of that agreement contrary to that of the bargaining agent and possibly the employer. Under such a scheme, the bargaining agent's status as exclusive representative in the determination of wages, hours and terms and conditions of employment is emasculated because the employer would be required to process through arbritration every individual grievance upon request, regardless of merit. Such individual grievance processing is in effect individual negotiations between the employer and the employee regarding the subject matter of the grievance. The Florida courts have long recognized the inherently destructive effect that individual negotiations between employer and employees have upon the right to collectively bargain. *Pasco County School Board v. PERC*, 353 So. 2d 108, 4 FPER ¶4033 (Fla. 1st DCA 1977). Such individual negotiations are no less destructive simply because they occur during the grievance process rather than at the negotiating table.[5]

There are also important practical reasons for limiting access to the arbitration machinery of contractual grievance procedures. Unlimited individual access would allow every employee, regardless of motive, to compel arbitration proceedings where the parties who negotiated the collective bargaining agreement deemend such proceedings unwarranted. The potential for harassment of the union and the employer, to the detriment of all concerned, from disgruntled individuals is very real.

See e.g., Black-Clawson Co., Inc. v. International Association of Machinist, Lodge 355 , 313 F.2d 179, 196 (5th Cir. 1962). Furthermore, one need not be very experienced in labor relations to realize the attractiveness to a rival or a minority union of being able to compete with the incumbent union for by indirectly processing grievances, regardless of merit, through an individual member. *See McGuire Public Employee Collective Bargaining In Florida — Past, Present and Future*, Fla. State L. Rev. 26, 101-02 (1973).

Finally, the policy we have adopted protects the taxpayer from the compulsory but unnecessary expenditure of public funds, a policy consideration not present in the private sector. If individual employees may, at their whim, compel arbitration of all grievances regardless of merit and contrary to the desires of the employer and the bargaining agent, significant public funds will be spent on expensive arbitration proceedings which would otherwise not be expended. The parties to the collective bargaining agreement would therefore have less funds available for truley meritorious grievances and the employer might be compelled to settle non-meritorious grievances contrary to a reasonable interpretation of the collective bargaining agreement to avoid expense, thereby establishing an erroneous precedent applicable to subsequent grievances. The interference with the statutory goal of promoting harmonious and cooperative relationships between the government and its employees who have chosen to bargain collectively which would occur if the FEA's position were adopted, is accurately summarized by the following language from *Vaca v. Sipes*, 386 U.S. at 191-92:

> If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the individual grievant to the vagaries of independent and unsystematic negotiation. Moreover, under such a rule, a significantly greater number of grievances would proceed to arbitration. This would greatly increase the cost of the grievance machinery and could so overburden the arbitration process as to prevent it from functioning successfully.

Contrary to FEA's assertion, then, the Commission's decision in *Heath* does not stand for the proposition that an individual has the unfettered right to avance a greivance through the contractual grievance procedure once the certified bargaining agent has exercised its exclusive right to discontinue processing the grievance based upon its good faith determination that the grievance lacks merit. As the above discussion demonstrates, such a conclusion is the antithesis of the concept of exclusively embraced by our decision in *Heath*. 5 FPER ¶10074 at 92. Accordingly, where the parties collective bargaining agreement reserves to the certified bargaining agent the exclusive right to submit grievances to arbitration, a public employer is not obligated to process an individual's grievance to arbitration if the certified bargaining agent has declined to advance the grievance because of its belief that the grievance lacks merit. Indeed, if the public employer does procees such a greivance to arbitration at the individual's request it might well violate Section 447.501(1) (a), (c), Florida

Statutes (1979). Such action could constitute circumvention of the bargaining agent and a unilateral alteration of the contractual grievance procedure. *Leon County CTA v. Leon County School Board*, 6 FPER ¶11001 at 4.

In this case the facts establish that the collective bargaining agreement grants all unit employees the opportunity to file grievances at Step I, but reserves to the LCTA the exclusive authority to advance these grievances to Step II through the final arbitrable step. The LCTA refused to process Hadley's grievance to arbitration following its express determination that the grievance lacked merit. Under these circumstances, irrespective of Hadley's membership or non-membership in the LCTA, the Association's actions do not constitute a waiver of its right to exclusively determine those grievances appropriate for arbitration. Therefore, the School Board is not obligated to proceed to arbitration upon Hadley's request.

It is so ordered.

PARRISH, Commissioner, concurring specially.

In light of my lengthy dissent in *Heath v. School Board of Orange County*, 5 FPER ¶10074 (1979), I feel it only appropriate that I explain my concurrence in the instant case. Since the issuance of the *Heath* decision (which was not appealed), the Florida Legislature has met in regular session three times. During those three sessions there have been a number of amendments to various sections of Part II of Chapter 447 of the Florida Statutes, but there has been no effort at modification of the statutory provisions relied upon in the *Heath* case in either the majority opinion or the dissent. I

think it is reasonable to presume that the Legislature is aware of the construction which has been placed on its enactments in the area of public sector collective bargaining by the agency charged with the administration of those enactments; especially where the issue is a significant one. Having engaged in that presumption, I think it is reasonable to construe the legislative silence on this issue during three consecutive sessions as a legislative ratification of the interpretation given to the applicable statutory provisions by the majority in the *Heath* case; or, at least, as a legislative acquiescence in the agency's interpretation.[6] Accordingly, although I continue to believe that the dissent in the *Heath* case was correct *when written*, I am now persuaded by three sessions of legislative silence that the majority view in the Heath case has proven to be a correct interpretation of the legislative will.

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[1]The School Board included in the petition a motion to stay the grievance/arbitration proceedings pending resolution of this matter, which was denied by the Commission. *In re School Board of Leon County*, 7 FPER ¶12119 (1980).

[2]By its terms the agreement is in effect from August 21, 1979 through August 20, 1982.

[3]*See Turner v. Air Transportation*, 468 F.2d 29, 300 (5th Cir. 1972); *St. Clair v. Local Union No. 515*, 1 BT, 442 F.2d 128, 130 (6th Cir. 1969); *Maggs v. PLRB*, 11 PPER ¶11103 (Pa.Comm. Ct. 1980); *Russell v. Patterson*, 10 PERB ¶7511 (N.Y. App. Div. 1976); *Norton v. Transportation Authority*, 90 LRRM 3054 (Mass. S.Ct. 1975).

[4]*Hughes Tool Company*, 56 NLRB 981, 14 LRRM 244 (1944) enforced 147 F.2d 69 (5th Cir. 1945) construing Section 9(a) of the National Labor Relations Act.

[5]For a discussion of the reasons that grievance processing in contract administration are considered as part of the collective bargaining process itself see Cox, *Reflections Upon Labor Arbitration*, 72 Har.L.Rev 1482. As the United States Supreme Court stated in *Conley v. Gibson*, 355 U.S. 45, 46 (1957);

> Collective bargaining is a continuing process. Among other things, it involves day-to-day adjustments in the contract and other work rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by contract.

[6]Although I have found no case precisely on point, I believe there is abundant support for this proposition when cases such as *State ex rel Szabo Food Services, Inc. of North Carolina v. Dickinson*, 286 So.2d 529 (Fla. 1973), ("When the Legislature reenacts a statute it is presumed to know and adopt the construction placed thereon by the State tax administrators.") are read together with cases such as *Walker v. State, Dept. of Transportation*, 366 So.2d 96 (Fla. 1st DCA 1979), and *Austin v. Austin*, 350 So.2d 102 (Fla. 1st DCA 1977) (Long-standing statutory interpretations made by officials charged with the administration of the statutes are given great weight by the courts.).

Appendix E

STATE OF FLORIDA
PUBLIC EMPLOYEES RELATIONS COMMISSION

Case No. CB-81-007
Order No. 81U-240
Issued: June 26, 1981

RUEL A. GALBREATH,

Charging Party,

v.

BROWARD COUNTY CLASSROOM TEACHERS ASSOCIATION, INC.,

Respondent.

Harold D. Smith, Hollywood, attorney for charging party.

Richard H. Frank, of FRANK, CHAMBLEE & KELLY, P.A., Tampa, attorney for respondent.

SUMMARY DISMISSAL

POWERS, Chairman.

On March 16, 1981, Ruel A. Galbreath, a teacher, filed an unfair labor practice charge alleging that the Broward County Classroom Teachers Association, Inc., breached its duty of fair representation by failing to submit his grievance to arbitration, and thereby caused Galbreath's employer, the School Board, to discriminate

against him because of his non-membership in the Association in violation of Section 447.501(2)(a) and (b), Florida Statutes (1979). Having considered the charge and supporting evidence submitted by the Charging Party,[1] the Commission concludes that the charge is insufficient to establish a *prima facie* violation of the applicable unfair labor practice provisions.[2]

The evidence submitted by the Charging Party discloses that the Association is the certified bargaining agent for a unit of instructional personnel employed by the School Board. Article III of the existing collective bargaining agreement contains a three-step grievance procedure which affords individual employees the option to process their grievances with or without Association representation at steps I and II, but reserves to the Association the exclusive right to process all unit employees' grievances to arbitration at step III.[3]

On or about July 3, 1980, the Charging Party individually filed a grievance against the School Board alleging that it violated the collective bargaining agreement by refusing payment for certain overtime work. The School Board denied the grievance at steps I and II. By letter dated October 20, 1980, the Association notified the Charging Party that it had decided not to pursue the grievance to arbitration because, in its judgment, the grievance lacked merit. *No evidence was submitted which supports the Charging Party's contention that the Association's decision was based upon Galbreath not being a member of the Association.*[4]

An exclusive bargaining agent's authority to represent all members of a bargaining unit includes an obligation to "serve the interests of all members without hostility or discrimination toward any, to exercise its

discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). In order to find that an employee organization breached its duty of fair representation by failure to process a grievance, the aggrieved unit member must demonstrate that the union abused its discretion and acted in an arbitrary or discriminatory manner or in bad faith when it decided not to proceed to arbitration. *Vaca v. Sipes*, 386 U.S. at 190; *Gow v. AFSCME, Local 1363*, 4 FPER ¶ 4168 (1978). Mere conclusional statements are not sufficient to establish bad faith, arbitrary, or discriminatory union conduct. *Balowski v. International U. United A. A. Imp. Workers*, 372 F.2d 829 (6th Cir. 1967); *Gow v. AFSCME, Local 1363*, 4 FPER ¶ 4168 at 325.

The evidence submitted by the Charging Party does not point to any specific instances of arbitrary, discriminatory, or bad faith conduct by the Association in processing his grievance. Viewed in the light most favorable to the Charging Party, the evidence simply establishes that the Association's decision to not process the grievance to arbitration was based on *its conclusion that the grievance did not constitute a violation of the collective bargaining agreement.* An employee organization's refusal to process a grievance does not alone, constitute a *per se* showing that the organization engaged in arbitrary, disciminatory or bad faith conduct. *Buchanan v. NLRB*, 597 F.2d 338 (4th Cir. 1978).

Accordingly the charge is insufficient to establish a violation of either subsections (a) or (b) of Section 447.501(2), Florida Statutes (1979). The charge is DISMISSED.

It is so ordered.

PARRISH and BROOKS, Commissioners, concur.

I HEREBY CERTIFY that this document was filed and a copy served on each party on June 26, 1981.

BY: [Illegible]
Deputy Clerk

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[1]On April 13, 1981, the Association filed a motion for summary dismissal with a supporting affidavit. A motion to strike the Association's motion for summary dismissal was filed by the Charging Party on April 24, 1981. A memorandum in opposition to the Charging Party's motion to strike was filed by the Association on April 30, 1981. Neither Chapter 447, Part II, nor the Commission's rules authorize the Commission to consider evidence filed by a respondent to an unfair labor practice charge prior to our determination of whether the charge is sufficient. Section 447.503(2), Florida Statutes (1979). Therefore, the motion for summary dismissal has not been considered in this case.

[2]By order issued this date the Commission dismissed a companion charge filed by the Charging Party against the School Board of Broward County in Case No. CA-81-027.

[3]The Agreement, by its terms, is in effect from August 16, 1979 through August 15, 1982.

[4]Even assuming the Charging Party had submitted evidence to this effect, a *prima facie* violation of Section 447.501(2)(a), Florida Statutes (1979), would not be established. Section 447.401, Florida Statutes (1979), specifically absolves a certified bargaining agent from any obligation to process grievances for unit employees who are not members of the employee organization. *A union's duty of fair representation does not arise, therefore, where it declines to process a grievance to arbitration based solely on the grievant's non-membership status. See Coats v. Jacksonville City Employees Local Union 301*, 6 FPER ¶ 11213 (1980); *In re School Board of Leon County*, PERC Order No. 81D-238 (June 26, 1981).

Appendix F

STATE OF FLORIDA
PUBLIC EMPLOYEES RELATIONS COMMISSION

Case No. CA-81-027
Order No. 81U-239
Issued: June 26, 1981

RUEL A. GALBREATH,

Charging Party,

v.

SCHOOL BOARD OF BROWARD COUNTY,

Respondent.

Harold D. Smith, Hollywood, attorney for petitioner.

Mark S. Seigle, Fort Lauderdale, representative for respondent.

SUMMARY DISMISSAL

POWERS, Chairman.

On March 16, 1981, Ruel A. Galbreath, a teacher, filed an unfair labor practice charge alleging that the Respondent violated Section 447.501(1)(a), (b) and (f), Florida Statutes (1979), by: refusing to discuss his grievance in good faith, denying him access to the grievance arbitration procedure; and otherwise interfering with, restraining and coercing him in the exercise of

his rights under Chapter 447, Part II. Having considered the charge and supporting evidence submitted by the Charging Party, the Commission concludes that the charge is insufficient to establish a *prima facie* violation of the applicable unfair labor practice provisions.[1]

The evidence contained in the charge discloses that the Broward County Classroom Teachers Association is the certified bargaining agent for a unit of instructional personnel employed by the School Board. Article III of the existing collective bargaining agreement contains a three-step grievance procedure which affords individual employees the option to process their grievances with or without Association representation at steps I and II, but reserves to the Association the exclusive right to process all unit employees' grievances to arbitration at step III.[2] On or about July 3, 1980, following unsuccessful attempts to secure payment for certain overtime work, the Charging Party filed a grievance alleging that the School Board's refusal to pay for such overtime work constituted a violation of Article VI-F of the collective bargaining agreement and the prevailing past practice.

In addition to the denial of the grievance at step I by the Charging Party's immediate supervisor, the grievant's request to be represented by counsel during the grievance hearings was rejected by the School Board's Director of Employee Relations. On September 8, 1980, following a hearing conducted in accordance with the step II contractual procedures, the Charging Party's grievance was denied. The Charging Party's subsequent attempts to persuade the Association to submit his grievance to arbitration were unsuccessful and he was notified by letter dated October 20, 1980,

that the Association decided not to pursue the grievance to arbitration. The letter stated:

> Having reviewed your case referred to above, CTA has decided not to pursue the matter to arbitration since in our judgment it lacks merit.
>
> In an effort to preserve your rights, we have requested and received an extension of the timeliness to file for arbitration to October 31, 1980. A letter from Mr. Seigle will confirm.
>
> I would recommend that you discuss this letter with your attorney to determine if you and he would want to pursue the matter on your own.

With regard to the alleged violation of Section 447.501(1)(f), Florida Statutes (1979), the evidence contained in the charge fails to establish that the School Board disregarded or refused to discuss the Charging Party's grievance in good faith. Representatives of the School Board met with the Charging Party at both steps I and II and discussed the alleged violations of the collective bargaining agreement. Although the grievance was denied by the School Board at both steps, an unfavorable resolution of a grievance is insufficient grounds, standing alone, to constitute a violation of Section 447.501(1)(f), Florida Statutes (1979). *McKay v. Metro Transit Agency/Dade County*, 6 FPER ¶ 11000 (1979). Moreover, the Charging Party has not established the essential element of a Section 447.501(l)(f), Florida Statutes (1979) violation; a steadfast failure and refusal by the public employer to process the grievance in good faith pursuant to the terms of the collective bargaining agreement. *See Liberty County NEA v. School Board of Liberty*

County, 6 FPER ¶ 11012 (1979); *International Association of Firefighters, Local 2353 v. City of Tarpon Springs*, 3 FPER 237 (1976).

The Commission also finds insufficient that portion of the charge alleging that the School Board improperly denied the Charging Party access to the arbitration procedure. The Commission has recently adopted the *universally held precedent* that where a collective bargaining agreement reserves to the certified bargaining agent the exclusive right to submit unit employee's grievances to arbitration, and a grievance has been rejected *on its merits* by the certified bargaining agent, the employer is not obligated to process that individual's grievance to arbitration. *In re School Board of Leon County*, Order No. 81D-238, (June 26, 1981).[3]

The collective bargaining agreement here reserves to a certified bargaining agent the exclusive right to process a unit employee's grievances to arbitration. The certified bargaining agent notified the Charging Party that it would not process his grievance to arbitration because it was, in the Association's judgment, without merit. Under such circumstances, the School Board is under no obligation to process the individual's grievance to arbitration. *The fact that the Association indicated that Galbreath may pursue the grievance on his own does not obligate the School Board to deviate from the contractual grievance procedure to process the grievance.*[4]

Accordingly, the charge is insufficient to establish a violation of subsections (a), (b) or (f) of Section 447.501(1), Florida Statutes (1979).

Therefore, it is DISMISSED.

It is so ordered.

PARRISH and BROOKS, Commissioners, concur.

I HEREBY CERTIFY that this document was filed and a copy served on each party on June 26, 1981.

BY: [Illegible]
Deputy Clerk

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[1]By order issued this date the Commission dismissed a companion charge filed by the Charging Party against the Broward County Classroom Teachers Association in Case No. CB-81-007.

[2]The Agreement, by its terms, is in effect from August 16, 1979 through August 15, 1982.

[3]*See Vaca v. Sipes*, 396 U.S. 171, 194 (1967); *Humphrey v. Moore*, 375 U.S. 335, 350 (1964); *Ford Motor Company v. Huffman*, 345 U.S. 330, 337 (1953); Rabin, "Protection of Rights", in *Portrait of a Process—Collective Negotiations in Public Employment* 297-304 (1979).

[4]Where the certified bargaining agent has refused to process a grievance to arbitration because of its determination that the grievance lacks merit, the employer is entitled to refuse to arbitrate that grievance by reason of a presumption that the union's decision was not made arbitrarily, discriminatorily or in bad faith. *See Vaca v. Sipes*, 386 U.S. 171. Likewise, where the union refuses to process a grievance to arbitration, but instructs the employee that he may pursue the grievance to arbitration on his own, the employer is entitled to presume that the Union has relinquished its contractual right to exclusively process that grievance to arbitration. Under such circumstances, should the School Board choose to process the grievance to arbitration, the Association would be estopped from asserting a violation of Section 447.501(1)(c), Florida Statutes (1979).

Appendix G

Excerpts from pages 3 & 4 of Galbreath's unfair labor charge dated March 12, 1981 and filed with PERC.

In the instant case the Employer's and Union's refusal to arbitrate shows that the only way an employee in the exclusive bargaining unit can be assured of a right to a fair and equitable grievance procedure is to become a member of a labor organization. This result is inconsistent with principles of federal labor law and due process. The duty of fair representation doctrine was developed in a series of cases involving alleged racial discrimination by unions certified as exclusive bargaining representatives under the Railway Labor Act. See *Steele v. Louisville & N. R. Co.*, 323 U.S. 192 and *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U.S. 210. Said doctrine was soon extended to unions certified under the National Labor Relations Act. See *Ford Motor Co. v. Huffman*, 345 U.S. 330. This doctrine was also extended to the Federal and State Public Labor Sector and was applied diligently by the Florida courts, until Florida Statute 447.401 was amended to except nonmembers of the union from the union's obligation to represent.

Excerpts from pages 23 & 24 of Galbreath's Initial Brief dated November 24, 1981 and filed in the Florida Court of Appeal.

The effect of F.S. §447.401 is to remove a public sector union's duty of fair representation to non-dues-paying members of the exclusive bargaining unit. In relieving the Union of any obligation to process grievances

of Galbreath, and all other non-dues-paying members, F.S. §447.401, on its face, presents a prima facie case of violation of the Union's duty of fair representation in that a failure to process the grievances of both union and non-union members, equally, is a breach of duty of fair representation. *Vaca v. Sipes* provides that under the duty of fair representation doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interest of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty and to avoid arbitrary conduct. F.S. §447.401, on its face, violates federal labor laws establishing a union's duty of fair representation. It has recently been held, in Florida, that public sector employees are entitled to the same rights as private sector employees. *City of Tallahassee v. Public Employees Relations Commission*, 393 So.2d 1147 (1st DCA 1981). It is clear that private sector employees have an equal right to a duty of fair representation from the union for all members of an exclusive bargaining unit. According to the principle set forth in the *City of Tallahassee* case, Galbreath is entitled to that same right of duty of fair representation that is enjoyed by the members of the Union that represents the exclusive bargaining unit in which Galbreath is included.

Excerpts from page 2 of Galbreath's Reply Brief dated February 22, 1982 and filed in the Florida Court of Appeal

A large portion of School Board's Brief goes into the history of the duty of fair representation in citing

many private sector decisions that, of course, have no relevancy to the Galbreath case in that the private sector has not removed the duty of fair representation from unions with reference to nonunion members. Finally, the School Board gets to the PERC decision of *Heath v. School Board of Orange County*, 5 FPER ¶10074 (1979). Like the union and PERC, the School Board tries to convince the court that it should follow PERC's interpretation of F.S. §447.401 and that it can be reassured that PERC will not allow the statute to be applied in an unconstitutional way. The court does not need to look to PERC's interpretation of F.S. §447.401 in order to tell whether it is unconstitutional. The language, on its face, is unconstitutional in that it removes the duty of fair representation from the union for nonmembers.

Excerpts from the index and pages 26, 27 & 28 of Galbreath's Initial Brief dated March 21, 1983 and filed in the Florida Supreme Court

Issues and Argument:

I. CAN PETITIONER BE LEGALLY FORECLOSED FROM ARBITRATION UNDER §447.401, FLORIDA STATUTES (1979) 7

II. IS FLORIDA STATUTES §447.401 IN VIOLATION OF PETITIONER'S RIGHTS UNDER THE FLORIDA RIGHT TO WORK LAW, ARTICLE I, SEC. §, OF THE FLORIDA CONSTITUTION AND HIS RIGHTS UNDER THE U.S. CONSTITUTION AND FEDERAL LABOR LAW 19

Galbreath has maintained all along, that PERC would have to have a "crystal ball" to know whether a union's refusal to request arbitration is influenced by the grievant's nonmembership status. All of this speculation could be eliminated by striking down F.S. §477.401 as being unconstitutional and thereby restoring the duty of fair representation to all employees in Florida, who hold jobs in exclusive bargaining units.

As stated earlier, a union cannot be permitted to decide to whom it will extend its duty of fair representation. The duty is statutorily imposed as a quid-pro-quo for the union's statutory right to exclusive representation. The union cannot, as PERC claims, waive its right of exclusivity. The U.S. Court of Appeals, Fifth Circuit supports Galbreath's argument that F.S. §447.401 is unconstitutional. The court, citing *Steele, supra*, stated in *Local Union No. 12, United Rubber, Cork, Linoleum & Plastic Workers of America, AFL-CIO v. National Labor Relations Board*, 368 F.2d 12, 17 (1966).

> Indeed, the Supreme Court has indicated that any statute purporting to bestow upon a union the exclusive right to represent all employees would be unconstitutional if it failed to impose upon the union this reciprocal duty of fair representation. *Steele v. Louisville & N.R.R., supra*, 323 U.S. at 198-199, 65 S.Ct. at 230, 89 L.Ed. at 180-181.

The foregoing case is dispositive of the question of whether F.S. §447.401 is unconstitutional. Galbreath maintains that upon enacting the proviso in 1977, the Florida Legislature made F.S. §447.401 unconstitutional

on its face by removing the duty of fair representation to non-members who are included in the certified bargaining unit. The proviso might well have made the entire Part II, of Chapter 447 unconstitutional. Chapter 447, Part II, bestows upon the unions the exclusive right to represent all employees in a certified bargaining unit and, according to the Fifth Circuit, if said statute fails to impose the duty of fair representation, it is unconstitutional.

The Fifth Circuit also stated that:

> . . . when the individual employee, pursuant to federal law aimed at preserving industrial harmony, is required to surrender completely his right of self-representation in deference to an "exclusive" bargaining agent designated by a majority of his co-workers, both logic and equity dictate that such agent be impressed with a reciprocal duty to "represent all its members, the majority as well as the minority, and * * * to act for and not against those whom it represents."

It is only logical that the Union could no more waive its right to exclusivity than Galbreath could unilaterally withdraw from the certified bargaining unit. The effect of §447.401 thus is to cut off non-union members from any meaningful access to the grievance procedure. This is a clear violation of the union's constitutional duty of fair representation, for non-union members are treated unequally even though exclusivity is maintained.

Excerpts from pages 4, 5 & 6 of Galbreath's Motion for Rehearing dated February 9, 1984 and filed in the Florida Supreme Court.

It is respectfully requested that this Court reconsider its ruling, grant a rehearing and issue an opinion that interprets F.S. 447.401 in a manner which makes its intent and meaning clear and certain, especially as to its relationship to Federal Labor Law and rights of due process and equal protection of the law.

By adopting PERC's ruling in *In re Leon County School Board*, without further comment, it is unclear as to how the Court views the proviso as it relates to Federal Labor Law, due process and equal protection of the law. The Court did show substantial concern during oral argument about the Union having the final say on the merits of Galbreath's grievance and as to whether he would be allowed access to arbitration. However, no comment was made on that issue in the final opinion. During oral argument, the question was raised as to whether the union could meet the requirements of being an impartial arbitrator where non-dues paying members are involved. The question was also raised as to why the union would want to do anything for a non-dues paying member. In response it was pointed out that Galbreath did not ask the union to do anything except to request arbitration to enable him to present his case to an impartial arbitrator through his own legal counsel. The Court noted that it was not likely to appear on the face of the record when a union refused to represent a non-member due to his non-member status.

It is respectfully suggested that the Court overlooked the significance of cited case law on lack of due process as it relates to Galbreath's entitlement to have an unbiased adjudicator determining whether his case had merit. The case law indicates that if there is inherent conflict between the union and the individual employee whose grievance is being denied on the grounds the grievance lacks merit, a question is raised under due process as to whether the union is sufficiently unbiased to determine the merits of the employee's grievance. *Gibson v. Berryhill*, 411 U.S. 564 (1973). There can be no doubt there was conflict between the CTA and Galbreath, who was not a dues-paying member of the union. These circumstances placed the union in a position where it was not sufficiently unbiased to determine the merits of Galbreath's grievance. The record submitted to PERC clearly shows there was sufficient merit to Galbreath's claim for overtime to at least entitle him to a hearing on the unfair labor practice charge to determine the type of investigation conducted by the union before it refused to request arbitration. The case law holds that a union's failure to fully investigate the facts constitutes a breach of duty of fair representation. *Tenorio v. NLRB*, 680 F.2d 598 (9th Cir. 1982). The evidence in this case shows the union failed to conduct even a minimal investigation. Had PERC scheduled a hearing, the union's failure to investigate would have been more clearly brought out.

It is respectfully suggested that in a case such as Galbreath's where the union has exclusive control of the grievance procedure and at the same time is authorized by statute to refuse to represent him as a non-member of the union, the union should have the burden of proof that it made a reasonable investigation

of the non-member's grievance before refusing to request arbitration. Otherwise, it should be assumed the refusal is based upon non-member status and the employee should be permitted to go to arbitration with his own legal counsel.

In light of the proviso of F.S. 447.401 there can be no doubt the union fails to meet due process requirements that an unbiased adjudicator determine the merits of Galbreath's grievance. Galbreath is entitled to a neutral or detached judge in the first instance to make the decision on whether his case is sufficiently meritorious to request arbitration. *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *Gibson v. Berryhill, supra.* The grievance procedure in this case is structurally biased in that it is designed primarily to serve the interests of the union and the public employer yet the union can refuse to represent someone in Galbreath's class and due to the language of the Collective Bargaining Agreement the employer also can refuse to permit the non-member to go to arbitration with his own counsel. It is patently unjust and a violation of Federal Labor Law to allow the union, as PERC has stated in *In re Leon County School Board*, to determine whether it desires to exercise its right of exclusive representation on behalf of non-members. Galbreath has no option to determine whether he wants to withdraw from the exclusive bargaining unit. He is forced into that position by statute F.S. 447.307(3)(b). Galbreath is forced to use the grievance procedure negotiated by a union that has been given a right to waive its exclusive representation rights over him when it suits the union's desires to do so. If this be the case, then Galbreath should have the right to withdraw from the certified bargaining unit and not be bound by the collective bargaining agreement grievance procedure

in pursuing his grievances with the employer. PERC's interpretation of the proviso is contrary to Federal Labor Law and due process.

F.S. 447.401, on its face, violates the equal protection clause. The distinction between a member and non-member violates the equal protection clause by distinguishing between classes of employees on a basis which is unrelated to the merits of an employees grievance. *Logan v. Zimmerman Brush Co.*, 102 S.Ct. 1148 (1982). There can be no rational basis for the proviso in F.S. 447.401. The only logical explanation for adopting the proviso is to get around the provisions of the Right to Work Law. Galbreath maintains that F.S. 447.401 runs afoul of Federal Labor Law by removing the union's duty to represent a certain class of employees while retaining its right to exclusive representation of said class of employees.

Appendix H

Letter from Galbreath's Principal Regarding Overtime Pay

THE SCHOOL BOARD OF BROWARD COUNTY, FLORIDA

December 5, 1978

Mr. James E. Maurer
Superintendent of Schools
School Board of Broward County, Florida
Fort Lauderdale, Florida

Dear Mr. Maurer:

I received your letter of December 1, 1978, concerning Mr. Ruel Galbreath, Horticulture Instructor at Boyd Anderson High School. To your question, "Did I authorize additional hours beyond the contract?" The answer is "no"; however I have no control over weather conditions and Mr. Galbreath probably would have been negligent had he not used his own discretion in protecting School Board property.

Please advise this office if you wish payment authorized because this circumstance is not spoken to by prescribed policies and procedures. Kindly advise me of your decision in this matter.

Respectfully yours,

John E. Aycock
Principal

JEA/eb

Handwritten Note from bottom of Letter Dated Dec 5, 1978

John —

I am not running Boyd Anderson or am I authorizing any payment for anything beyond 7½ hours.

Jim Maurer

Office - Supreme Court, U.S.
FILED
AUG 6 1984
ALEXANDER L. STEVAS
CLERK

No. 83-2168

In The

Supreme Court of the United States

October Term, 1983

RUEL A. GALBREATH

Appellant,

v.

THE SCHOOL BOARD OF BROWARD COUNTY, FLORIDA, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

MOTION TO DISMISS FILED ON BEHALF OF THE SCHOOL BOARD OF BROWARD COUNTY, FLORIDA

Of Counsel:
Joseph A. Caldwell

GORDON D. ROGERS
MULLER, MINTZ, KORNREICH, CALDWELL, CASEY, CROSLAND & BRAMNICK, P.A.
Suite 1800, One Biscayne Tower
Two South Biscayne Boulevard
Miami, Florida 33131
(305) 358-5500

Attorneys for Appellee, The School Board of Broward County, Florida

August, 1984

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RESTATEMENT OF QUESTION PRESENTED

WHETHER A FLORIDA PUBLIC SCHOOL TEACHER WHO IS NOT A UNION MEMBER HAS A FEDERAL CONSTITUTIONAL RIGHT TO COMPEL HIS PUBLIC EMPLOYER OR HIS EXCLUSIVE BARGAINING AGENT TO PROCESS A GRIEVANCE THROUGH BINDING ARBITRATION WHERE THE COLLECTIVE BARGAINING AGREEMENT RESERVES TO THE UNION THE RIGHT TO INVOKE ARBITRATION AND THE UNION, AFTER REPRESENTING THE TEACHER AT THE LOWER LEVELS OF THE GRIEVANCE PROCEDURE, REFUSES TO ARBITRATE BECAUSE THE GRIEVANCE LACKS MERIT?

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No. 83-2168

In The

Supreme Court of the United States

October Term, 1983

RUEL A. GALBREATH

Appellant,

v.

THE SCHOOL BOARD OF BROWARD COUNTY, FLORIDA, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

MOTION TO DISMISS FILED ON BEHALF OF THE SCHOOL BOARD OF BROWARD COUNTY, FLORIDA

Appellee, the SCHOOL BOARD OF BROWARD COUNTY, FLORIDA, respectfully moves, pursuant to Rule 16.1, Rules of the Supreme Court of the United States (1980 Revision), for dismissal of the above-entitled appeal on the grounds hereinafter summarized and argued below:

1. Appellant Galbreath was not affected by and therefore lacks standing to attack the exception set forth in Section 447.401, Florida Statutes (1979), which allows a Florida public sector union the option of requiring a

nonmember to provide his or her own representation in contractual grievances. In this case, Galbreath's union *did* represent him and did not invoke the challenged exception. Accordingly, Galbreath cannot present a justiciable issue for resolution by this Court. Dismissal is also appropriate because Galbreath's alleged injuries (*i.e.*, denial of unauthorized overtime pay, individual access to arbitration and/or administrative hearings on his unfair labor practice charges) would not be redressed *even if* the exception were ruled unconstitutional. The appeal thus seeks no more than an advisory opinion outside the jurisdiction of this Court under Article III of the United States Constitution.

2. Appellant Galbreath has presented no more than a garden variety fair representation claim which should be summarily dismissed for want of a substantial federal question. Although his appeal is framed as a challenge to Section 447.401, Florida Statutes (1979), his true contention is that as a nonmember of the union, he enjoys a state or federal constitutional "right" not to be represented by the union and to proceed individually to arbitration. It was Galbreath who unsuccessfully sought to avoid the union's authority as exclusive bargaining representative by asserting an alleged right to take his own grievance to arbitration with his own legal counsel prior to and after his bargaining agent refused to do so because the claim lacked merit. Thus, Galbreath's true complaint is that his union agreed to and did represent him in connection with his grievance despite his nonmember status. The only way Appellant Galbreath could obtain the relief he requests in this appeal is if this Court were to recede from its express approval of the constitutionality of ex-

clusive representation principles in public sector collective bargaining enunciated in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). The appeal should therefore be dismissed.

3. Appellant Galbreath's lack of standing and other reasons provide an independent and wholly adequate nonfederal ground upon which the Florida Supreme Court found "Galbreath's constitutional attack on section 447.401, Florida Statutes (1979), to be without merit." (Appendix to Jurisdictional Statement at p. 9).[1]

4. Finally, even if he had the requisite standing and had raised a substantial federal question in this Court, Galbreath's appeal should be dismissed because the question was not timely or properly raised in the proceeding below.

———o———

STATEMENT OF PROCEEDINGS BELOW AND FACTS NECESSARY TO ARGUMENT

Appellant, Ruel Galbreath, is a salaried teacher of horticulture employed by the School Board of Broward County, Florida (hereinafter, "the School Board"). The School Board is a party to a collective bargaining agreement with the Broward County Classroom Teachers Association, Inc. (hereinafter, "the CTA or Union"), which organization was at all times material herein certified under Chapter 447, Part II, Florida Statutes (1979), as the exclusive collective bargaining agent for a bargaining unit

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[1] References to the Appendix to Appellant's Jurisdictional Statement will hereinafter be designated as [A — page number].

comprised of all salaried instructional personnel of the School Board, including Galbreath. The agreement established the terms and conditions of employment for all bargaining unit personnel and provided a statutorily required grievance procedure which ended in binding arbitration available to all employees, irrespective of membership or nonmembership in the CTA. At all times material herein, Galbreath was not a member of the CTA [A 2, 51].

The dispute underlying Galbreath's unfair labor practice charges commenced in 1977, when Galbreath began to demand compensation in addition to his annual salary for time which he claimed to have worked attending horticulture shows and, on one or more occasions, protecting School Board property (plants) from inclement weather. His first written demand to his school principal in October, 1978, claimed that Galbreath and another horticulture teacher were entitled to approximately $4,000.00 each in accumulated overtime payments.

Despite the School Board's denial of his claims for unauthorized overtime compensation, Galbreath continued to demand payment in person and through various legal counsel until July, 1980, when he filed a formal grievance under the provisions of the collective bargaining agreement.[2] A cover letter attached to the grievance form stated that Galbreath would be represented by outside counsel in processing the grievance.

Galbreath and his legal counsel were subsequently advised that the contractual grievance procedure reserved

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[2] In the intervening period between October, 1978 and July, 1980, Galbreath claimed to have worked additional overtime and thus increased his demand for payment to approximately $4,700.00.

the right to represent employees to the CTA [A 37-38]. Galbreath then agreed, "under protest," to be represented by the CTA, but demanded that the grievance be submitted to arbitration if not granted at the initial phases of the three step grievance procedure. After the Step II hearing, the grievance was denied by the School Board as untimely and additionally on the ground that the collective bargaining agreement provided no basis for payment for overtime not authorized in advance. The CTA thereafter declined to take the grievance to Step III for arbitration based upon its conclusion that the overtime claim lacked merit. The School Board refused Galbreath's demand for individual access to arbitration because the agreement reserved the right to invoke arbitration to the CTA [A 38-39].

In March, 1981, Galbreath filed unfair labor practice charges with the Florida Public Employees Relations Commission (hereinafter, "PERC") against the School Board for denying him individual access to the arbitration procedure and against the CTA for alleged breach of its duty of fair representation.[3] The charges asserted Galbreath's conclusory "belief," without any other evidence, that the CTA had discriminatorily refused to arbitrate his grievance because he was not a union member

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[3] Galbreath alleged that the School Board violated Sections 447.501(1) (a), (b) and (f), Florida Statutes (1979) by refusing to discuss his grievance in good faith, denying him access to the grievance-arbitration procedure and generally interfering with his rights under Chapter 447, Part II, Florida Statutes (1979). The CTA was alleged to have breached its duty of fair representation and to have caused the School Board to discriminate against Galbreath based upon nonmembership in violation of Sections 447.501(2) (a) and (b), Florida Statutes (1979).

[A 33-34]. The unfair labor practice charges were summarily dismissed by PERC on the grounds that in the absence of evidence raising an inference of bad faith or arbitrary conduct, the CTA could refuse to arbitrate a nonmember's grievance because it lacked merit. The School Board was held not required by law to arbitrate with an individual employee under such circumstances.

Galbreath appealed dismissal of his unfair labor practice charges pursuant to Section 447.504, Florida Statutes (1981), to the Florida Court of Appeals, Fourth District. His primary contention was that Section 447.401 violated the "right to work" guarantees of Article I, Section 6 of the Florida Constitution (1968), because it entirely eliminated the CTA's duty of fair representation to Galbreath [A 42-43]. At the same time, he filed suit against the School Board and the CTA in the United States District Court, Southern District of Florida, pursuant to 42 U.S.C. §§ 1983 and 1985, generally alleging, *inter alia,* that Section 447.401 was violative of Article I, Section 6 of the Florida Constitution (1968), and the concurrent equal protection and due process guarantees of the United States and Florida Constitutions.[4]

Galbreath's initial brief to the Florida District Court of Appeals stated as follows, at pages 8-9:[5]

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[4] *Ruel A. Galbreath v. The Broward County Classroom Teachers Association, Inc. et al.,* Case No. 81-6403-Civ-JCP (S.D. Fla., filed July 30, 1981). The action was subsequently dismissed by "Order Granting Defendants' Motion to Abstain and Dismissing This Cause Without Prejudice," filed April 20, 1982.

[5] The School Board acknowledges that appeal of administrative agency action in Florida to a District Court of Appeal

(Continued on next page)

> Galbreath is not raising his § 1983 and § 1985 claims in this appeal and he hereby specifically reserves a right to litigate the same in Federal Court or to raise the civil rights issue in State Court at a later date, in the event the Federal Court declines to consider the same.

The Fourth District Court of Appeals affirmed dismissal of Galbreath's unfair labor practice charges, holding that the CTA had lawfully refused to submit Galbreath's grievance to arbitration and that the School Board was not obligated to allow him to individually invoke the contractual arbitration procedure where the CTA refused to do so because the claim lacked merit [A 18]. However, the court certified the following question to the Florida Supreme Court as being of great public importance:

> Where the certified bargaining agent retains contractual control over the arbitral step of the grievance procedure and it declines to process a grievance to arbitration because it believes the grievance to be without merit, is the public employer still obligated to arbitrate the dispute if the grievant submits it to arbitration because the certified bargaining agent has declined to "represent" the grievant?

Galbreath's brief to the Florida Supreme Court relied primarily upon the Florida Constitution, and mentioned briefly the United States Constitution, in arguing that Section 447.401 unconstitutionally eliminated the

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(Continued from previous page)

constitutes a litigant's first opportunity to raise constitutional challenges because state agencies lack judicial authority to overrule a statute on constitutional grounds. *See Department of Revenue v. AMREP Corporation,* 358 So.2d 1343, 1351 (Fla. 1978); *Florida Education Association/United v. Public Employees Relations Commission,* 346 So.2d 551 (Fla. 1st DCA 1977).

CTA's duty of fair representation. The Florida Supreme Court affirmed the District Court, answering the certified question in the negative and holding that Galbreath had no absolute right to compel the CTA or the School Board to arbitrate his claim simply because he was not a union member. Both the Florida Supreme Court and the District Court adopted verbatim in their decisions pertinent quotations from a prior PERC decision, *In re Leon County School Board*, 7 FPER ¶12286 (Fla. PERC 1981),[6] which held that where a union does not invoke the Section 447.401 exception and chooses to process a grievance for a nonmember employee, it acts subject to a duty of fair representation [A 3-9; A 19-32]. At the conclusion of its opinion, the Florida Supreme Court stated without further discussion:

> We also find Galbreath's constitutional attack on section 447.401, Florida Statutes (1979), to be without merit. Accordingly, we approve the decision under review. [A 9].

———o———

ARGUMENT AND CITATION OF AUTHORITY

This case does not fall within the appeal jurisdiction of the United States Supreme Court and is not otherwise appropriate for review by the Court.

A. Galbreath Lacks Standing To Challenge The Constitutionality Of Section 447.401, Florida Statutes (1979).

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[6] The *Leon County School Board* decision was specifically cited in PERC's summary dismissals of Galbreath's unfair labor practice charges against the CTA [A 36] and the School Board [A 40].

An appellant's standing to challenge a state statute in the United States Supreme Court is a separate issue which must be independently determined by this Court. *Cramp v. Board of Public Instruction of Orange County, Florida,* 368 U.S. 278 (1961). The uniform consequence of flawed standing has been denial of review by this Court, whether treated as a jurisdictional defect for failure to present a "case or controversy," *Warth v. Seldin,* 422 U.S. 490 (1975), or as an independent and adequate non-federal ground for the judgment below. *Cramp, supra.*

Standing sufficient to invoke the jurisdiction of this Court is not conferred by a litigant's mere abstract desire to challenge a state statute, nor is it established by allegations of wholly speculative or remotely possible benefits conceivably to be derived from a favorable decision. *Warth, supra.* The constraints imposed by Article III of the United States Constitution require a litigant to demonstrate specific, concrete facts showing personal harm directly attributable to a state enactment and additionally to show that his alleged injuries would be redressed by a decision holding the challenged provision unconstitutional.

Galbreath's claims in the case at bar fail all of the above requirements. First, he can show no injury directly or even remotely attributable to the challenged exception contained in Section 447.401, because the CTA in this case treated Galbreath's overtime claim precisely as it would have *if the exception did not exist.* It chose the option of processing his grievance, represented him as it would any union member and at all times acted subject to potential future liability in the event that it breached its

duty of fair representation. Thus, despite the existence of the exception, Galbreath was afforded precisely the same legal rights and remedies in processing his grievance as would have been available to a union member. Accordingly, a decision of this Court striking down the exception would be merely advisory because no employee, whether union or non-union, has any absolute right to take a grievance to arbitration where his or her bargaining agent makes a good faith decision not to do so because the claim lacks merit. *Vaca v. Sipes,* 386 U.S. 171 (1967).

Galbreath's complete lack of standing is further demonstrated by the fact that his claimed injuries would not be directly or even remotely remedied by a decision of this Court striking down the exception contained in Section 447.401, Florida Statutes (1979) as unconstitutional. Such a decision would confer no tangible benefit upon Galbreath, would not grant his claimed "right" to refuse union representation and to compel individual arbitration of his overtime claims and would not provide a basis for reversal of PERC's dismissal of his unfair labor practice charges. The Court would leave Galbreath as it found him and accomplish nothing more than removal of a union option which was not exercised in this case in any event. Accordingly, the appeal should be dismissed for failure to provide a justiciable "case or controversy" within the jurisdiction of this Court.

B. Galbreath's Appeal Does Not Present A Substantial Federal Question.

Galbreath lacks standing to press his abstract constitutional attack upon Section 447.401, Florida Statutes (1979). However, tangentially at least, Galbreath appears

to have mounted an ambiguous and broad-based attack upon the entire concept of exclusive representation approved by this Court in *Vaca v. Sipes, supra,* and *Abood v. Detroit Board of Education, supra.* The School Board submits that Galbreath's claim to an alleged constitutional right to individually arbitrate his grievance and his complaints regarding the allegedlly inadequate protections provided to non-union employees by traditional burdens of proof in fair representation cases have already been rejected by this Court. Accordingly, this appeal presents no true controversy worthy of further consideration and should be summarily dismissed.

C. Adequate And Independent Non-Federal Grounds Support The Florida Supreme Court's Determination That Galbreath's Constitutional Claims Lack Merit.

Galbreath's complete lack of standing to challenge Section 447.401, Florida Statutes (1979) provides a wholly adequate non-federal ground upon which the Florida Supreme Court should have dismissed his constitutional claims. *Cramp v. Board of Public Instruction of Orange County,* 368 U.S. 278, 281 (1961).

It is also possible that the Florida Supreme Court considered and dismissed the constitutional claims on their merits. Equal protection of the law was not a viable issue because Galbreath was afforded the same access to the contractual grievance procedure as was available to union members. Similarly, Galbreath received his full measure of due process of law by exercising his right to assert duty of fair representation charges against his union upon its refusal to arbitrate his grievance and by

having the disposition of such charges subjected to judicial review in the courts.

The dubious merits of Galbreath's grievance and the gross deficiencies in his unfair labor practice charges also had an unquestionable impact upon the decisions of both Florida appellate courts. The record reflects, and both courts below were aware, that Galbreath had the option of processing his overtime grievance under either the collectively bargained procedure controlled by the CTA or under the School Board's administrative, "Board Policy" procedure in which Galbreath could have been represented in a hearing before the School Board by outside counsel [Florida Supreme Court, Record on Appeal at p. 55]. Galbreath (or his legal counsel) *chose* the contractual grievance procedure with full knowledge of the limitations imposed by the CTA's authority. Accordingly, the Florida Supreme Court could well have concluded that Galbreath was estopped to claim any alleged deprivation of due process by his election of forums.

It is also relevant that Galbreath relied in his claim for unauthorized overtime upon language contained in Article VI of the 1979-82 collective bargaining agreement.[7] The provisions of Article VI concerned non-mandatory or "permissive" subjects of bargaining (*e.g.*, class size, etc.). By the terms of the agreement, disputes con-

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[7] Galbreath's Jurisdictional Statement makes reference to the following language contained in Article VI, Section F of the 1979-82 collective bargaining agreement at page 18:

> An employee in a vocational program with a teaching assignment which requires in excess of 300 minutes of student contact time per day shall be compensated for such excess assignment at the employee's hourly rate for those days when students are present.

cerning Article VI could not be submitted to an outside arbitrator but rather were to be resolved by the elected School Board members under the Step III (ALTERNATE) provision of the grievance arbitration article of the contract.[8] The question of whether Galbreath's grievance could have been submitted to an outside arbitrator *at all* was thus highly debatable. Accordingly, the record evidence—all of which was supplied by Galbreath in support of his unfair labor practice charges, provided no basis whatsoever upon which either PERC or the courts below could have sustained any presumption of bad faith or discriminatory intent against the CTA or the School Board.

Finally, it is probable that the Florida Supreme Court evaluated Galbreath's constitutional attack upon Section 447.401, Florida Statutes (1979) solely with reference to

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[8] The Step III (ALTERNATE) provision of Article III of the 1979-82 collective bargaining agreement provided in pertinent part:

> A grievance arising from the provisions of Article VI shall be subject to the grievance procedure in this Article III, except that Step III shall be as follows: If the grievant is not satisfied with the disposition of the Grievance by the Superintendent or his/her designee or if no disposition has been made within the specified time limit, the grievance may be submitted to the Board by the CTA by filing a copy of the grievance with the Board Chairperson within twenty (20) working days of the date of the disposition at Step II, or the expiration of the time limit. The Board Chairperson shall schedule a meeting on the grievance to be held within ten (10) working days of the date the grievance is received. The Board shall indicate its disposition of the grievance in writing to the CTA through the Board Chairperson within five (5) working days of the meeting. The disposition of the Board shall be final and binding and shall not be subject to court or administrative review.

his claim that the challenged exception violated the "right to work" guarantees of Article I, Section 6 of the Florida Constitution (1968). As noted *infra,* Galbreath's primary federal constitutional arguments were never briefed to the Florida Supreme Court and were first raised in oral argument or in Galbreath's motion for rehearing. A decision of the highest court of a state construing a state statute as not violative of rights guaranteed by the state constitution would not be appropriate for review by this Court. *Bowe v. Scott,* 233 U.S. 658 (1913). Accordingly, the appeal should be summarily dismissed because the decision of the Florida Supreme Court is sustainable upon adequate and independent non-federal grounds.

D. Even If Galbreath Had The Requisite Standing And Had Presented A Substantial Federal Question, Which He Has Not, The Appeal Should Be Summarily Dismissed For Failure To Properly Present And Develop The Federal Constitutional Claims Below

The School Board acknowledges that phrases such as "equal protection," "due process," "unconstitutional," and "Federal Labor Law" pervade Galbreath's unfair labor practice charges and briefs below. However, prior to oral argument and his motion for rehearing before the Florida Supreme Court, Galbreath's primary constitutional contentions centered upon alleged conflicts between Section 447.401 and Article I, Section 6 and other provisions of the Florida Constitution (1968). Galbreath specifically declined (but reserved the right) to present his federal constitutional claims to the Florida District Court of Appeals. Despite dismissal of his federal action, he did not thereafter attempt to clarify or develop his al-

leged federal constitutional claims before the Florida courts.

Galbreath's Jurisdictional Statement acknowledges in part at pages 12-14 that many of his federal constitutional arguments were first raised below at oral argument or in his motion for rehearing to the Florida Supreme Court. The terse order of that court denying the motion for rehearing gives no indication that the new constitutional arguments were considered or ruled upon, stating only that the motion "is hereby denied" [A 11].

Galbreath also relies upon his counsel's recollection of questions posited by the Justices of the Florida Supreme Court during oral argument and matters raised for the first time in his motion for rehearing in urging this Court to surmise that his federal constitutional claims *must have* been considered and rejected on the merits below [Jurisdictional Statement at pp. 12-14, 21, 25]. However, no such assumption can reasonably be made in this case based upon the wholly ambiguous state of the record and the manner in which the federal claims were presented. It is equally likely that the Florida Supreme Court either did not understand the arguments, rejected them as untimely or concluded that Galbreath lacked standing to raise them in any event.

Well established precedent of this Court based upon sound jurisdictional and practical considerations counsels against the overt speculation urged by Galbreath. The Court has uniformly required litigants seeking review before the highest court in the nation to affirmatively demonstrate that federal claims were fully developed and squarely ruled upon by the highest court of a state. *Lynch v. New York ex rel. Pierson,* 293 U.S. 52 (1934),

Webb v. Webb, 451 U.S. 493 (1981). Galbreath's appeal fails this test as well and should therefore be summarily dismissed.

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CONCLUSION

Galbreath's lack of standing to challenge the constitutionality of Section 447.401, Florida Statutes (1979), under either the Florida or United States Constitutions provides an adequate jurisdictional basis for summary dismissal of this appeal and also constitutes an adequate non-federal ground upon which the decision below can be sustained. The untimely and ambiguous manner in which Galbreath presented his federal constitutional claims below casts further doubt upon jurisdiction and renders review by this Court, whether by appeal or certiorari, inappropriate. The appeal should therefore be dismissed.

Respectfully submitted,

GORDON D. ROGERS
(Counsel of Record)
MULLER, MUNTZ, KORNREICH,
CALDWELL, CASEY, CROSLAND
& BRAMNICK, P.A.
Suite 1800, One Biscayne Tower
Two South Biscayne Boulevard
Miami, Florida 33131
(305) 358-5500

Attorney for Appellee, The School Board of Broward County, Florida

Office Supreme Court, U.S.
FILED
AUG 10 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-2168

In The

Supreme Court of the United States

October Term, 1983

RUEL A. GALBREATH,

Appellant,

vs.

THE SCHOOL BOARD OF BROWARD COUNTY, FLORIDA, THE BROWARD COUNTY CLASSROOM TEACHERS ASSOCIATION, INC., and THE PUBLIC EMPLOYEES RELATIONS COMMISSION,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

MOTION TO DISMISS APPEAL

MARK F. KELLY
LAW OFFICES OF
FRANK, KELLY & MCKEE, P.A.
401 S. Albany Avenue
Tampa, Florida 33606
(813) 251-0555

Counsel for Appellee, Broward County Classroom Teachers Association, Inc.

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

MOTION TO DISMISS APPEAL

PARENT COMPANIES AND AFFILIATES

The Broward County Classroom Teachers Association, Inc. is an employee organization affiliated with the Florida Teaching Profession-NEA, and the National Education Association.

MOTION TO DISMISS APPEAL

The Broward County Classroom Teachers Association, Inc. (CTA), an appellee in the captioned matter, moves the Court, pursuant to Rule 16.1(b), for the entry of an order dismissing the appeal on the ground that it does not present a substantial federal question, or that the federal questions sought to be reviewed were not timely or properly raised and were not expressly passed on. References to the Jurisdictional Statement filed by the appellant, Ruel A. Galbreath (Galbreath), are designated "J.S. —" or "J.S. App. —," setting forth the page of the Jurisdictional Statement or its Appendix at which the material referred to can be found.

THE FACTS ON WHICH THE MOTION IS BASED

This appeal originates in two unfair labor practice charges filed by Galbreath with the Public Employees Relations Commission (PERC). J.S. 2, 10; J.S. App. 42. PERC is an agency charged with administering Florida's Public Employees Relations Act (PERA), §447.201, *et seq.*, Florida Statutes (1981), and thereby regulating labor relations involving Florida's public employees and employers. The charge against the CTA alleged that it breached its duty of fair representation by refusing to take to arbitrate Galbreath's grievance concerning overtime pay. J.S. App. 33-34. The charge against Galbreath's employer, the School Board of Broward County, Florida (School Board), alleged that its refusal to arbitrate Galbreath's grievance, in reliance on the CTA's determina-

tion that it lacked merit, constituted an unfair labor practice. J.S. App. 37-38. Galbreath's unfair labor practice charges mention no provision of the United States Constitution. One of the charges asserts that the actions of the CTA and the School Board forced Galbreath to become a member of a labor organization, and that "[t]his result is inconsistent with principles of federal labor law and due process." J.S. App. 42.

PERC dismissed both unfair labor practice charges. J.S. App. 33-40. In so doing, it considered only the charges themselves and the evidence Galbreath submitted to support them. J.S. App. 34, 36, n. 1; 38. Viewing such evidence in the light most favorable to Galbreath, PERC nonetheless found that the CTA's decision not to pursue Galbreath's grievance "was based on its conclusion that the grievance did not constitute a violation of the collective bargaining agreement." J.S. App. 35. PERC specifically noted that "[n]o evidence was submitted which supports [Galbreath's] assertion that the [CTA's] decision was based upon Galbreath not being a member of the [CTA]." J.S. App. 34. In neither order does PERC refer to any provision of the United States Constitution.

Galbreath appealed PERC's summary dismissal of his unfair labor practice charges. In his initial brief to the Florida Fourth District Court of Appeal, Galbreath again makes no reference to the United States Constitution, only to "federal labor laws." J.S. App. 42-43. Nor does his reply brief refer to any provision of the United States Constitution; he merely states that § 447.401, Florida Statutes (1979) "on its face, is unconstitutional in that it removes the duty of fair representation from the union for nonmembers." J.S. App. 44.

The Fourth District Court of Appeal affirmed PERC's summary dismissal of Galbreath's unfair labor practice charges, making no mention of any provision of the United States Constitution. J.S. App. 17-32; Galbreath v. School Board of Broward County, 424 So.2d 837 (Fla. 4th DCA 1983). Based upon its review of the evidence in the record, the Court concluded that

> The Classroom Teachers Association found that [Galbreath's] grievance lacked merit and refused to process it through the arbitration stage. The union did not base its refusal on appellant's nonunion status.

J.S. App. 18; 424 So.2d at 838. Although it affirmed PERC's action, the Fourth District Court of Appeal certified to Florida's Supreme Court the question whether a public employer in Florida is required to arbitrate a grievance when the exclusive bargaining agent, having contractual control over the grievance procedure, determines that the grievance lacks merit. J.S. App. 18-19; 424 So.2d at 838-839.

It is in his initial brief to the Florida Supreme Court that Galbreath first makes reference to "his rights under the U.S. Constitution," along with an assertion that § 447.401 is "unconstitutional." J.S. App. 44-45. The Florida Supreme Court affirmed the decision of the Fourth District Court of Appeal, noting that the CTA, in refusing to process Galbreath's grievance to arbitration, " . . . based this decision not on Galbreath's non-union status but rather on the lack of merit in his grievance." J.S. App. 2; Galbreath v. School Board of Broward County, 446 So.2d 1045, 1047 (Fla. 1984). With respect to his claims that § 447.401 is "unconstitutional," the Court stated: "We also find Galbreath's constitutional attack on Section 447.401,

Florida Statutes (1979), to be without merit." J.S. App. 9, 446 So.2d at 1049.

Galbreath filed a motion for rehearing in which he refers to decisions involving state statutes claimed to offend the due process clause of the Fourteenth Amendment. J.S. App. 47-50. The Florida Supreme Court denied Galbreath's motion without comment. J.S. App. 11.

ARGUMENT

A. The appeal presents no substantial federal question.

It is no easy task to ascertain precisely what "federal question" Galbreath believes to exist in this case. There are repeated references in the Jurisdictional Statement to Galbreath's "constitutional attack" on § 447.401, Florida Statutes (1979), as if the meaning of those words were obvious. The terms "due process" and "equal protection" also appear, but without much elucidation. The various briefs filed by Galbreath in the state courts shed almost no light on the precise nature of the federal claims he now asserts.

The Jurisdictional Statement, however, provides some basis on which Galbreath's contentions can be discerned. We argue below that all or some of Galbreath's federal claims were not timely or properly raised below, and were not expressly considered by the Florida Supreme Court. But assuming that the claims are properly before the Court, the federal questions asserted appear to be these:

Section 447.401 is inconsistent with "Federal labor law."

Section 447.401 is unconstitutional on its face because it permits a union to refuse to process a non-member's grievance on account of his lack of union membership.

Section 447.401 violates Galbreath's due process rights because it permits the merits of his grievance to be assessed by the CTA, which is "biased" because Galbreath is not a CTA member.

None of the foregoing questions is "substantial" within the meaning of 28 U.S.C. § 1257(2).

1. "Federal labor laws" have no bearing on this appeal.

Galbreath's repeated and perplexing references to "Federal labor laws" do not create a federal question for this Court's consideration. Galbreath is employed by a public school system in Florida. "The National Labor Relations Act leaves regulation of labor relations of state and local governments to the states." Abood v. Detroit Board of Education, 431 U.S. 209, 223 (1977). Indeed, it is doubtful whether Congress could regulate such matters even if it chose to do so. *See* National League of Cities v. Usery, 426 U.S. 833 (1976). PERC and the Florida judiciary may from time to time borrow certain principles developed under the National Labor Relations Act and incorporate them into Florida law, but once adopted they are nonetheless matters of Florida law, no matter what their origin may be.

Galbreath also relies on *City of Tallahassee v. Public Employees Relations Commission,* 410 So.2d 487 (Fla. 1982) for the proposition that Florida's public employees generally enjoy the same collective bargaining rights as

private sector employees. This is no doubt true, but only because Artice I, § 6 of the Florida Constitution so provides; again, this is purely a question of state law, quite beyond this Court's jurisdiction. *E.g.* Herb v. Pitcairn, 324 U.S. 117 (1945). Whether Florida's public employees generally must or should enjoy the same rights as private sector employees is no more within this Court's province than was the wisdom of Michigan's decision to authorize the agency shop in *Abood v. Detroit Board of Education, supra*, 431 U.S. at 224-225. Unless some right derived from the United States Constitution is threatened, the existence of "Federal labor laws" does not confer jurisdiction over this appeal.

2. Galbreath lacks standing to challenge § 447.401, Florida Statutes (1979) on federal constitutional grounds.

The linchpin of Galbreath's constitutional attack on § 447.401 is that it "removes the duty of fair representation" from Florida's public-sector unions, *i.e.* it permits unions to refuse to "represent" nonmembers by refusing to process their grievances because they are not members. This is the gist of his various and ill-defined claims that § 447.401 is "unconstitutional on its face," as well as his specific claim that it denies him equal protection of the laws "by distinguishing between classes of employees (members and non-members) on a basis which is unrelated to the merits of an employee's grievance." J.A. 14.

The record conclusively demonstrates, however, that Galbreath lacks standing to press these claims. After examining only the evidence submitted by Galbreath, and viewing it in the light most favorable to him, PERC con-

cluded that the CTA's refusal to process his grievance was because it lacked merit, not because Galbreath was not a CTA member. Both the Fourth District Court of Appeal and the Florida Supreme Court reached the same conclusion on the same record. Galbreath's Jurisdictional Statement discloses no "extraordinary circumstances" which might warrant the rejection of these findings. California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc., 445 U.S. 97, 111-112 (1980). On the contrary, the findings are unassailable, and the matters of record on which they are based are similar to those which a federal district court would consider in ruling on a motion to dismiss for lack of standing. *See* Warth v. Seldin, 422 U.S. 490, 501-502 (1975).

According to Galbreath, what makes §447.401 unconstitutional is that it permits unions like the CTA to refuse to process grievances for employees because they are not CTA members. But even if this is true, Galbreath is not among those injured by the asserted unconstitutionality of § 447.401. The fact that Galbreath was not a CTA member had nothing to do with the disposition of his grievance. Nor has Galbreath shown that the CTA was in fact "biased" against him, or that any bias it might conceivably have had influenced its assessment of the merits of his grievance.

Galbreath simply cannot show that he suffered any "direct injury" as a result of the asserted unconstitutionality of § 447.401. *See* Massachusetts v. Mellon, 262 U.S. 447, 488 (1923). Although Galbreath may have been "injured" in the sense that he was denied an opportunity to have his grievance submitted to arbitration, there is no "logical nexus" between this result and the asserted con-

stitutional infirmity of § 447.401. *See* Flast v. Cohen, 392 U.S. 83, 101-102 (1968).

Even if this Court were to accept Galbreath's argument and find § 447.401 unconstitutional, Galbreath would not benefit. If the language in § 447.401 permitting unions to refuse to process non-member grievances were stricken, unions would still be free to reject grievances found to lack merit; Galbreath's grievance would still lack merit in the eyes of the CTA and it would not be submitted to arbitration. Since the result in this case would be unchanged by the declaration Galbreath seeks, there is no justiciable controversy before the Court concerning the constitutionality of § 447.401. Doremus v. Board of Education, 342 U.S. 429, 434 (1952); *cf.* Bateman v. Arizona, 429 U.S. 1302, 1305 (1976) (Rehnquist, J., Circuit Justice).

3. The CTA's authority to determine the merits of Galbreath's grievance does not abridge his due process rights.

The foregoing considerations also expose the flaw in Galbreath's claim that § 447.401 violates his due process rights by permitting the CTA, rather than an "unbiased adjudicator," initially to assess the merits of his grievance. Galbreath has simply failed to present any evidence whatsoever that the CTA was *in fact* biased against him in such a way that its treatment of his grievance was affected. *Cf.* Hortonville Joint School District No. 1 v. Hortonville Education Association, 426 U.S. 482, 491 (1976).

Galbreath claims that because he is not a CTA member, the CTA is inherently incapable of being fair and should be disqualified from passing on the merits of his grievance. Galbreath cites *Ward v. Village of Monroe-*

ville, 409 U.S. 57 (1972) and *Gibson v. Berryhill*, 411 U.S. 564 (1973) in support of this proposition. But in *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248 (1980), the Court explained that the "rigid requirements" of *Ward*,

> designed for officials performing judicial or quasi-judicial functions, are not applicable to those acting in a prosecutorial or plaintiff-like capacity. Our legal system has traditionally accorded wide discretion to criminal prosecutors in the enforcement process [citation omitted], and similar considerations have been found applicable to administrative prosecutors as well . . . .

In deciding whether to pursue a grievance to arbitration, the CTA is more akin to an "administrative prosecutor" than to an "official performing judicial or quasi-judicial functions;" indeed, a union's discretion in connection with the processing of employee grievances is well established. Vaca v. Sipes, 386 U.S. 171, 191 (1967). The "rigid requirements" of *Ward* are thus inapplicable, particularly in view of the fact that the CTA's decision was reviewable by PERC and the Florida courts. There is no claim here that PERC or the Florida courts were biased against Galbreath. Hence his due process claim is without merit.

In connection with his due process claims, Galbreath intimates that he should have been relieved of the burden of demonstrating a *prima facie* case by applying some kind of presumption that the CTA engaged in arbitrary or bad faith conduct, thereby requiring the CTA affirmately to prove its good faith. Assuming that this Court has the constitutional authority to mandate such a drastic revision of a state statute, Galbreath has shown no basis for doing so. Galbreath makes no showing that evidence of the CTA's bad faith existed but was unavailable to him. He hints

that it is impossible for a non-member to get proof that a union acted in bad faith in refusing to process his grievance, but the imagination easily yields examples: evidence that similar grievances were processed for union members; evidence that few or no grievances of any kind are ever processed for non-members; evidence that the grievance in question is clearly meritorious; general evidence of the union's animus toward non-members; etc. Had Galbreath presented evidence of bad faith on the CTA's part, PERC would have given him a hearing and, if warranted, relief. Galbreath's simple failure to present proof to support his claims is no basis for imploring this Court to rewrite Florida's public sector labor statutes.

B. The federal claims were not timely or properly raised, nor were they expressly passed on by the Florida Supreme Court.

When one seeks review in this Court of a state court judgment on the ground that the validity of a state statute was "drawn in question," 28 U.S.C. § 1257(2) requires that "the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time." Street v. New York, 394 U.S. 576, 584 (1969), *quoting* New York *ex rel.* Bryant v. Zimmerman, 278 U.S. 63, 67 (1928). Neither the element of precision nor that of timeliness is satisfied here.

We have already described the manner in which Galbreath's "constitutional" claims were presented to PERC and the court below. Galbreath's reference to § 447.401 as being "unconstitutional" is by no means a clear invocation of any federal right. Galbreath has argued that § 447.401 is "unconstitutional" because it eliminates the duty of fair

representation which prevails in the private sector. In support of this argument, Galbreath refers to *City of Tallahassee v. PERC*, 393 So.2d 1147 (Fla. 1st DCA 1981), *affirmed*, 410 So.2d 487 (Fla. 1982). But that case addresses the validity of another PERA provision in light of Article I, Section 6 of the Florida Constitution, which guarantees the right of employees to bargain collectively. Thus his claim that § 447.401 is "unconstitutional" was most likely based on the Florida Constitution. Similarly, his references to "due process" may well have been to Article I, Section 9 of the Florida Constitution, (1968) which provides, in pertinent part:

Due Process

> No person shall be deprived of life, liberty or property without due process of law . . . .

Although Galbreath does make an unexplained reference to the "U. S. Constitution" in his initial brief to the Florida Supreme Court, it accompanies a reference to Article I, Section 6 of the Florida Constitution, and is followed by an argument apparently based on the Florida constitutional provision. J.S. App. 44-45.

Assuming that Galbreath even raised a federal issue in the Florida Supreme Court by his single reference to the "U. S. Constitution," it is far from clear that the issue was passed on. The Florida Supreme Court may have addressed only the state constitutional claims in rejecting Galbreath's "constitutional attack." J.S. App. 9. Any federal claims may well have been deemed waived since they were not raised in the lower court. Smith v. Brantley, 400 So.2d 443, 445 (Fla. 1981); South Dade Farms, Inc. v. Peters, 107 So.2d 30, 32 (Fla. 1958).

This case is similar to *Webb v. Webb,* 451 U.S. 493 (1981). There, as here, no federal question was mentioned in the state court opinion under review; the Court thus assumed that "the omission was due to want of proper presentation in the state courts," 451 U.S. at 495. The Court also rejected the petitioner's attempt to show that the federal issue had in fact been raised; her references to "full faith and credit" were deemed ambiguous and, more likely than not, references to state law, even though the state constitution there had no "full faith and credit" provision. Thus the Court determined that it lacked jurisdiction to consider the appeal.

Here, an assumption that Galbreath's federal contentions were deemed waived or abandoned rests on a solid foundation of Florida law. As we have shown, no reference to the United States Constitution appears in Galbreath's unfair labor practice charges filed with PERC or in his briefs filed with the Fourth District Court of Appeal. All questions presented for appellate review must appear in the initial brief, Fla. R. App. P. 9.210(b); *Denny v. Denny,* 334 So.2d 300 (Fla. 1st DCA 1976), as must an argument on each issue. Lynch v. Tennyson, 443 So.2d 1017 (Fla. 5th DCA 1984). Nor may matters be raised for the first time in a motion for rehearing. As was noted in *Polyglycoat Corp. v. Hirsch Distributors, Inc., on rehearing,* 442 So.2d 958, 960 (Fla. 4th DCA 1984):

> It is the duty of counsel to prepare appellate briefs so as to acquaint the Court with the material facts, the points of law involved, and the legal arguments supporting the positions of the respective parties. See Re: *Estate of Barrett,* 137 So.2d 587 (Fla. 1st DCA 1962) and *Clonts v. Spurway,* 104 Fla. 340, 139 So. 896 (1932). When points, positions, facts and sup-

> porting authorities are omitted from the brief, a court is entitled to believe that such are waived, abandoned or deemed by counsel to be unworthy.

The excerpts in Galbreath's Jurisdictional Statement leave one persuaded that no federal claims were properly presented.

If the federal claims were not properly presented to the Florida Supreme Court, then Galbreath's effort to correct the defect in his motion for rehearing came too late to create jurisdiction in this Court. *E.g. Hanson v. Denckla,* 357 U.S. 235 (1958); Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945).

———o———

CONCLUSION

Based upon the foregoing, the Court is urged to dismiss the appeal for lack of a substantial federal question or because the questions sought to be presented were not timely or properly raised and were not expressly passed on.

Respectfully submitted,

Mark F. Kelly
Law Offices of
Frank, Kelly & McKee, P.A.
401 S. Albany Avenue
Tampa, Florida 33606
(813) 251-0555

Office-Supreme Court, U.S.
FILED
SEP 19 1984
ALEXANDER L. STEVAS,
CLERK

NO. 83-2168

in the Supreme Court of the United States

OCTOBER TERM, 1983

RUEL A. GALBREATH,

Appellant,

vs.

THE SCHOOL BOARD OF BROWARD COUNTY, FLORIDA, THE BROWARD COUNTY CLASSROOM TEACHERS ASSOCIATION, INC. and THE PUBLIC EMPLOYEES RELATIONS COMMISSION,

Appellees.

On Appeal from the Supreme Court of the State of Florida

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEES' MOTIONS TO DISMISS

Harold D. Smith
LAW OFFICES
HAROLD D. SMITH, P.A.
P.O. Box 1780
Hollywood, Florida 33022
Telephone: (305) 923-6500
Counsel for Appellant

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On Appeal from the Supreme Court of the State of Florida

STATEMENT OF THE CASE

This brief is in opposition to Motions to Dismiss filed by Appellee, the School Board of Broward County, Florida, and Appellee, The Broward County Classroom Teachers Association, Inc. The following abbreviations will be used throughout this brief:

Appendix in this Brief A, Appendix in Jurisdictional Statement JSA, School Board's Motion to Dismiss SB, Union's Motion to Dismiss U

The School Board's statement that Galbreath agreed "under protest" to be represented by the CTA and that the Union did represent him in the grievance procedure is incorrect (SB-2,5). Galbreath represented himself in the grievance procedure, with the Union attending as an observer. It is also inaccurate for the School Board to allege that Galbreath had access to an alternate procedure where he could have been represented by his own counsel (SB-12). The Union also controlled access to the final step of the alternate procedure, which did not terminate in arbitration (SB-13, footnote 8). Galbreath's claim was not based entirely on breach of the collective bargaining agreement, it was also based on past practice, which is subject to resolution by an arbitrator.

The Union's representation that its decision not to pursue Galbreath's grievance "was based on its conclusion that the grievance did not constitute a violation of the collective bargaining agreement" is misleading (U-3). Although PERC's summary dismissal of the unfair labor practice charge made such a statement, there was no evidence whatsoever before PERC on which to base that conclusion. In fact, the Union was never required to give any explanation for its bare statement that the grievance lacked merit. (A-1) This Court is not bound by unsupported conclusions of fact by the lower court. In a case cited in the Union's Motion, this Court stated . . . "the view of the facts taken by the Court below, though it is entitled to respect, does not bind us and we may make an independent examination of the record". *Doremus v. Board of Education*, 342 U.S. 429, 432 (1952).

ARGUMENT

I.

FLORIDA PUBLIC SECTOR LABOR RELATIONS IS SUBJECT TO PROVISIONS OF THE UNITED STATES CONSTITUTION AND FEDERAL LABOR LAWS ESTABLISHED BY UNITED STATES SUPREME COURT DECISIONS.

The Union cites *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) and *National League of Cities v. Usery*, 426 U.S. 833 (1976) in support of its argument that since Galbreath is employed by a public school system in Florida, Federal Labor Laws are inapplicable to this case. The Union did, however, acknowledge that this Court would have jurisdiction over this appeal if some right derived from the United States Constitution is threatened (U-6,7).

The *National League of Cities* case can be distinguished on the basis it deals with application of the commerce clause to extend coverage of the Fair Labor Standards Act to State employers. The Court found this displaced the States' abilities to structure employer-employee relationships in areas of traditional governmental functions, such as fire prevention and police protection, etc. Even if clear violations of Galbreath's constitutional rights under the due process and equal protection clause were not present, there would be no basis under *National League of Cities* for excluding Florida from application of Federal Labor Law principles established by decisions of this Court.

In *Abood*, this Court expressly approved the constitutionality of exclusive representation principles in public sector collective bargaining. It would make no sense to say this Court, in *Abood*, can give specific support to the concept of exclusive union representation in the

public sector but it cannot hold public sector unions to the quid-pro-quo duty of fair representation. In *Abood*, this Court expressly imposed the duty of fair representation on the exclusive representative. *Abood* p. 221. The Court also pointed out that the Michigan statute provided for a duty of fair representation. *Abood* p. 224. See footnote 15 p. 261.

With reference to Galbreath's allegation that the Florida Supreme Court failed to follow its own principle established in *City of Tallahassee v. The Public Employee Relations Commission*, 410 So.2d 487, (Fla. 1982), the Union argues this is purely a question of State law. The Union overlooks the fact that this Court has held that a State ground must be supported by prior State practice and not be inconsistent with prior determinations of the State's highest Court. See 32A AmJur 2d, *Federal Practice and Procedure* §674.

II.

APPELLANT GALBREATH HAS STANDING TO CHALLENGE THE CONSTITUTIONALITY OF SECTION 447.401, FLORIDA STATUTES.

Both the School Board and Union argue that Galbreath lacks standing to challenge the constitutionality of F.S. §447.401. The lack of standing argument was raised by the Appellees below and the same was rejected (A-3, 4, 9).

Despite the School Board's claim that the Union elected to represent Galbreath and treated his grievance precisely as it would have if the exception did not exist (SB-9) the record shows Galbreath proceeded through the grievance procedure representing himself and the Union only sat in as an observer. In fact, the Union's so-called option to elect to represent would only come into effect at the arbitration step since the CTA reserved its exclusive control of the grievance procedure for the arbitration

phase only (A-4). Even the letter from Union representative Lachance indicates the Union did not elect to represent Galbreath in this instance. The Union requested and obtained an extension of time in order for Galbreath to confer with his counsel on whether he wanted to proceed to arbitration with his own legal counsel (A-1). The School Board denied Galbreath due process of law in violation of the Fourteenth Amendment when it refused to permit him to proceed to arbitration in these circumstances. In any event, F.S. §447.401 is unconstitutional on its face and the Union's so-called option, which was created artificially by PERC, doesn't correct the constitutional problems with the statute.

Galbreath, as a non-dues paying member of the CBU, bears the burden that he is treated differently than dues paying members of the unit. This burden alone is sufficient to establish standing. In *Orr v. Orr*, 440 U.S. 268 (1979), this Court struck down an Alabama statute as being in violation of the Equal Protection Clause of the Fourteenth Amendment where the statute imposed alimony obligations on husbands but not wives. On the standing issue, the possibility was noted that appellant's success before this Court may not ultimately bring him relief from the judgment outstanding against him. The Court said:

> There is no question but that Mr. Orr bears a burden he would not bear were he female . . . The burden alone is sufficient to establish standing. Our resolution of a statute's constitutionality often does "not finally resolve the controversy as between th[e] appellant and th[e] appellee," *Stanton v. Stanton*, 421 U.S. at 17. We do not deny standing simply because the "appellant, although prevailing here on the federal constitutional issue, may or may not ultimately win [his] lawsuit." *Id.* at 18.
>
> 440 U.S. at 273

There is no question that Galbreath bears a burden he would not bear were he a member of the union. Although he is not permitted to withdraw from the exclusive bargaining unit, he bears the burden that the Union is not required to extend to him the same representation it is required to extend to union members.

In addition, if Galbreath prevails, he would receive the tangible benefit of being reimbursed for attorney fees he has incurred to vindicate his right, as well as the right of all other non-dues paying members of the certified bargaining unit. The courts have looked favorably upon plaintiffs who vindicate a right shared by all members of the union, especially in cases involving the right to fair representation. *Harrison v. United Transportation Union*, 530 F.2d 558, 564 (4th Cir. 1975) *cert. denied* 425 U.S. 958 (1976).

III.

FEDERAL QUESTIONS WERE TIMELY RAISED BELOW AND THE FLORIDA SUPREME COURT RULED ON THE SAME.

Appellees argue that Galbreath failed to properly raise Federal questions in the lower court. It is difficult to imagine the appellees taking this position when the briefs below clearly show that constitutional issues were raised and argued. See the School Board's answer brief, which was filed in the Florida Supreme Court before oral argument, specifically listing the U.S. constitutional issues (A-7) (See also JSA-42-50; A-2-9) Naturally, the U.S. constitutional arguments were not pressed before PERC with the same force as before the appellate courts because as the School Board pointed out in its Motion to Dismiss, State agencies lack judicial authority to overrule a statute on constitutional grounds (SB-6, footnote 5). The School Board's statement that Galbreath specifically declined to present his Federal constitutional claims to the Florida District Court of Appeals is incorrect (SB-14). The only

claims reserved for the Federal District Court involved §1983 and §1985 issues. The briefs, oral argument and Motion for Rehearing clearly show the Florida Supreme Court gave substantial consideration to the constitutional arguments but in its opinion, decided that said arguments had no merit.

Regarding the requirement that a state court determine a federal question, it is provided in 32A AmJur 2d, *Federal Practice and Procedure*, §668, that:

> . . . . if the record clearly shows that the Federal issue was raised before the trial court by appropriate motions and arguments, and was argued in briefs before both the State's intermediate and highest appellate courts, the Federal question can then be considered by the Supreme Court, despite the lack of a definitive ruling on the issue by the State's highest court.

The *Marshall v. Jerrico*, 446 U.S. 238 (1980) case cited by the Union on the unbiased adjudicator issue can be distinguished in that in *Marshall* there was a right to discovery and a hearing on the Assistant Regional Administrator's determination (U-9,10). In the case at bar, Galbreath had no *right* to a judicial hearing to challenge the Union's decision because PERC denied him a hearing through summary dismissal.

IV.

THE BURDEN OF PERSUASION SHOULD HAVE BEEN SHIFTED TO THE UNION TO SHOW THE BASIS FOR ITS UNEXPLAINED CONCLUSION THAT APPELLANT GALBREATH'S GRIEVANCE LACKED MERIT.

The Union alleges Galbreath has failed to present evidence that the CTA was, in fact, biased against him in such a way that its treatment of his grievance was affected (U-9). The record submitted to PERC included a letter

from Galbreath's principal, which clearly states Galbreath probably would have been negligent had he not used his own discretion in protecting School Board property (JSA-50, 51). The letter alone is sufficient evidence to require the Union to conduct further investigation before refusing to request arbitration. Galbreath submitted a newspaper article to the Florida District Court of Appeal which clearly indicates that an investigation would have shown the School Board had a past practice of paying unauthorized overtime hours (A-2).

A recent decision by the Federal District Court, District of Columbia, lends support to Galbreath's argument that the burden of persuasion should have been shifted to the Union in this case. In *Schapansky v. Department of Transportation, FAA*, 735 F.2d 477, 482 (Fed. Cir. 1984), a former air traffic controller was required to rebut a prima facie case that he participated in a strike. The District Court held that even though the Civil Service Reform Act of 1978 keeps the burden of proof in an adverse action case on the employing agency throughout, the presentation of a strong prima facie case shifts the "order of presentation" to the employee. The Court said this is because the employee is in the best position to present explanatory evidence to counter that prima facie case. The Union certainly is in the best position to present explanatory evidence as to why it failed to request an arbitration hearing after Galbreath instructed it to do so.

A union may refuse to process a grievance for a multitude of reasons, but it may not do so without reason, merely at the whim of someone exercising union authority. A union must use a rational decision making process in refusing to request arbitration. A thorough written statement of the union's reason for not continuing to arbitration is essential to meaningful review of the union's performance. *Public Sector Grievance Procedures, Due Process and the Duty of Fair Representation*, 89 Harv. L.Rev. 752, 787 (1976).

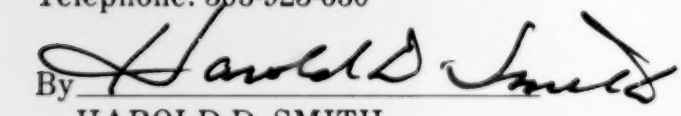
CONCLUSION

This case carries very large issues in the labor law field. The failure of the Florida Supreme Court to declare F.S. §447.401 unconstitutional strikes at the very heart of rights protected by the due process and equal protection clause.

In light of labor law principles established by this Court in *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944) and other cases, it is difficult to conceive of a state being allowed to extend to a union exclusive rights of representation and then to explicitly remove the Union's duty of fair representation to non-dues paying members of the exclusive unit. The State of Florida cannot have it both ways. Even the School Board in its answer brief to the Florida Supreme Court stated that it preferred that public unions be required to cull out *all* unmeritorious grievances, rather than be allowed to simply waive their representation rights (A-8). Either F.S. §447.401 must be struck down as unconstitutional or Galbreath must be relieved from the restrictions of exclusivity and be allowed to proceed to arbitration on his own or with his representative. Not all collective bargaining agreements reserve control of arbitration to the bargaining agent. (A-7) We urge the Court to note probable jurisdiction in this case.

Respectfully submitted,

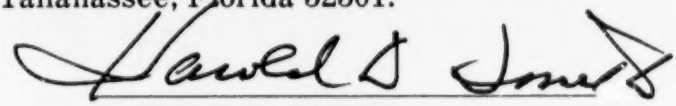
LAW OFFICES
HAROLD D. SMITH, P.A.
P. O. Box 1780
Hollywood, Florida 33022
Telephone: 305-923-650

By 
HAROLD D. SMITH

Counsel for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 18, 1984, pursuant to Supreme Court Rule 33, three copies of the foregoing Appellant's Brief in Opposition to Appellees' Motions to Dismiss were mailed to: JIM SMITH, Attorney General, State of Florida, The Capitol, Tallahassee, Florida 32301; GORDON DEAN ROGERS, ESQ., Muller, Mintz, Kornreich, Caldwell & Casey, P.A., Attorneys for the School Board, One Biscayne Tower, Suite 1800, Two Biscayne Boulevard, Miami, Florida 33131; MARK F. KELLY, ESQ., Frank & Kelly, P.A., Attorneys for Classroom Teachers Association, 341 Plant Avenue, Tampa, Florida 33606; and PHILLIP P. QUASCHNICK, ESQ., General Counsel, Public Employees Relations Commission, 2600 Blair Stone Road, Suite 300, Tallahassee, Florida 32301.



HAROLD D. SMITH

Counsel for Appellant

Appendix

Appendix A

October 20, 1980

William R. Galbreath
1720 Southwest 48th Avenue
Fort Lauderdale, Florida 33317

RE: Grievance # 69

Dear Mr. Galbreath:

Having reviewed your case referred to above, CTA has decided not to pursue the matter to arbitration since in our judgement it lacks merit.

In an effort to preserve your rights, we have requested and received an extension of the timelines to file for arbitration to October 31, 1980. A letter from Mr. Seigle will confirm.

I would recommend that you discuss this letter with your attorney to determine if you and he would want to pursue the matter on your own.

Sincerely,

/s/ PAUL LACHANCE

Paul Lachance
Assistant Executive Director

PL:al

cc: Mark Seigle
Director, Employee Relations

Appendix B

Excerpt from *FORT LAUDERDALE NEWS* August 28, 1981, entitled "School Maintenance Wasteful-Audit", attached to Galbreath's Reply Brief dated February 22, 1982 and filed in the Florida Court of Appeal

- Maintenance employees work overtime without first receiving permission from an area superintendent or Superintendent William McFatter, as required by School Board policy.

On two weekends, employees logged 370 overtime hours and were paid $5,033 without obtaining prior approval. In addition, Baurmash said he was unable to verify 182 of the overtime hours worked.

Excerpts from pages 23, 24 & 28 of Galbreath's Initial Brief dated November 24, 1981 and filed in the Florida Court of Appeal

It is Galbreath's position that the duty of fair representation is a right arising out of Federal Statutes and case law and that the Florida Legislature cannot remove that duty by simply changing the language of F.S. §447.401.

* * *

F.S. §447.401, on its face, violates federal labor laws establishing a union's duty of fair representation.

* * *

In dicta, however, the Court stated in *Steele:*

> We think that the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates.

Excerpts from pages 1 and 2 of Galbreath's Reply Brief dated February 22, 1982 and filed in the Florida Court of Appeal

The Answer Brief filed by the CTA takes much the same course as PERC's, going hand in hand in trying to convince the court that even if there are constitutional problems with F.S. §447.401, it need not have concern because PERC has interpreted and applied the same to avoid any constitutional infringements.

* * *

Here again, Galbreath takes the position that a statute unconstitutional on its face does not become constitutional based upon PERC's interpretation and application thereof.

* * *

The CTA argues that Galbreath does not have standing to challenge the constitutionality of F.S. §447.401.

Excerpts from Pages 14 and 17 of School Board's Answer Brief dated January 15, 1982 and filed in the Florida Court of Appeal

Accordingly, this Court should find at the outset that Galbreath lacks the requisite standing to challenge the constitutionality of Section 447.401, Florida Statutes (1979) through the instant proceeding.

* * *

Simply stated, the courts have held that a union's status as "exclusive representative" carries with it the concimitant [sic] obligation to fairly represent all members of the bargaining unit—not just favored members of the union.

Excerpt from page 16 of CTA's Answer Brief dated January 15, 1982 and filed in the Florida Court of Appeal

The appellant's lack of standing, *i.e.*, his lack of injury occasioned by the statute he seeks to condemn, also compels the conclusion that there is no justiciable controversy before the Court which would support the constitutional adjudication which the appellant seeks.

Excerpts from page 6 of CTA's Supplemental Brief dated July 30, 1982 and filed in the Florida Court of Appeal

In the present case, the contractual language submitted to the Commission by Galbreath describes a procedure whereby the CTA reserves its exclusive rights solely over the arbitration phase of the grievance procedure.

Excerpts from pages 7, 19, 25, 30 and 31 of Galbreath's Initial Brief dated March 21, 1982 and filed in the Florida Supreme Court

It is respectfully suggested that the case involves substantial constitutional issues as to whether Galbreath's Federal Constitutional rights have been violated and whether his rights under Federal Labor Law have been violated

* * *

The proviso has been applied to Galbreath to deny him equal protection and his due process right to have his grievances heard by an impartial tribunal.

* * *

In relieving the Union of any obligation to process grievances of Galbreath, and all other non-dues paying members, F.S. §447.401 is unconstitutional on its face.

* * *

The effect of F.S. §447.401, coupled with Florida case law, is to allow the Union and School Board to deny Galbreath a right of redress of his greivances guaranteed by the First Amendment to the U.S. Constitution and Article I, Sec. 5, of the Florida Constitution. Denial of Galbreath's access to arbitration, pursuant to the terms of the CBA, also denies him equal access to legal remedies available to dues-paying union members, in violation of rights guaranteed by the First and Fourteenth Amendments to the U.S. Constitution.

Excerpts from pages 1 and 2 of Galbreath's Reply Brief dated May 10, 1983 and filed in the Florida Supreme Court

From reading Respondents' Briefs, consisting of a total of more than 100 pages, it is obvious no one was able to give a logical reason as to why the proviso of F.S. §447.401 should pass constitutional muster. The School Board said it has no great love for the proviso and would prefer that public unions be required to cull out all unmeritorious grievances rather than being allowed to simply waive their representation rights, thus obligating the public employers to proceed through expensive arbitration proceedings against individual employees. (School Board Brief, page 45) The Union likes the proviso and it would like to retain exclusive control of access to arbitration, but at the same time be able to avoid its statutory duty of fair representation to non-dues-paying members of the certified bargaining unit, at its sole discretion. PERC recognizes there may be some problems with the proviso, but it claims to have done its best to construe the proviso to render it constitutional. The plain fact is, the proviso is unconstitutional on its face and it doesn't matter how many different ways PERC interprets the statute, it doesn't change the face of the statute. The statute is unconstitutional because it removes the duty of fair representation from the union for non-dues-paying members of the exclusive bargaining unit

Excerpts from page 16 of CTA's Answer Brief dated April 15, 1983 and filed in the Florida Supreme Court

It must be noted that not all collective bargaining agreements reserve control of arbitration to the bargaining agent.

Excerpts from pages 26, 30, 32 and 45 of the School Board's Answer Brief dated April 13, 1983 and filed in the Florida Supreme Court

In his unfair labor practice charges below and in his brief to this court, Galbreath claims that he had an absolute right to be represented by outside counsel, instead of the Union, in processing his grievance and that he had an absolute right to take his grievance through the contractual arbitration procedure. Denial of these assumed rights by the School Board, the Union and ultimately, PERC, is asserted as: (1) a violation of Galbreath's rights to equal protection and due process of law under the Florida and United States Constitutions; (2) a violation of his right to refrain from being a union member under the First Amendment to the United States Constitution, Article I, Section 6 of the Florida Constitution and Section 447.301(2), Florida Statutes (1979)

* * *

GALBREATH HAS FAILED TO SHOW ANY DEPRIVATION OF EQUAL PROTECTION OF THE LAW OR DUE PROCESS OF LAW

* * *

Galbreath's ancilliary point regarding the First Amendment right to freedom of association is equally without merit. The United States Supreme Court in

Abood v. Detroit Board of Education, 431 U.S. 209 (1977) specifically held that an agency shop provision which required teachers in a non-right-to-work state who did not approve of public unions to pay service charges to an exclusive collective bargaining agent did not violate their right to freedom of association under the First Amendment. Such a direct involuntary association, in and of itself, was held by the Court to be justified by the benefits to all employees of exclusive representation and collective bargaining. Accordingly, the remote and indirect "compulsion" relied upon by Galbreath as establishing a violation of his First Amendment rights is clearly insufficient under the *Abood* precedent. Therefore, in the absence of any violation of the Florida Constitutional provision, no relief can be afforded on Galbreath's claims in this case.

* * *

In both cases, PERC held that in enacting Sections 447.301(4) and 447.501(1)(f), the Legislature intended to follow established precedent under federal law.

* * *

The School Board has no great love for the proviso to Section 447.401 and would prefer that public unions be required to cull out all unmeritorious grievances rather than being allowed to simply waive their representation rights, thus obligating the Public Employers to proceed through expensive arbitration proceedings against individual employees.

Excerpts from pages 22 and 25 of PERC's Answer Brief dated April 15, 1983 and filed in the Florida Supreme Court

GALBREATH LACKS STANDING TO CHALLENGE THE CONSTITUTIONALITY OF THE PROVISO TO SECTION 447.401.

In addition to addressing the certified question, Galbreath alleges that the proviso to Section 447.401, Florida Statutes (1981), which allows a certified bargaining agent to refuse to process grievances for bargaining unit employees who are not members of the organization, violates Article I, Section 6 of the Florida Constitution, federal labor law, and federal equal protection and due process requirements.

* * *

Galbreath asserts that the proviso to Section 447.401, Florida Statutes (1981), is unconstitutional because it allows certified bargaining agents to treat nonmember bargaining unit employees different from bargaining unit employees who are members of the union in the processing of grievances.